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EDITOR'S NOTE

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tatus: GRANTED

ocketed:
pril 24, 1985

Title: Marie D. Sorenson, etc., Petitioner
v.
Secretary of the Treasury of the United States and United States

Court: United States Court of Appeals for the Ninth Circuit

Counsel for petitioner: Greenfield, Peter

Counsel for respondent: Solicitor General

ntry	Date	Note	Proceedings and Orders
1	Apr 24 1985	G	Petition for writ of certiorari filed.
2	May 23 1985		Brief of respondents Sec. of Treasury, et al. in opposition filed.
3	May 28 1985		DISTRIBUTED. June 13, 1985
4	Jun 17 1985		Petition GRANTED.
			**********
5	Jul 8 1985	G	Motion of Acting Solicitor General to dispense with printing the joint appendix filed.
6	Aug 5 1985		Brief of petitioner Marie D. Sorenson, etc. filed.
8	Sep 4 1985		Order extending time to file brief of respondent on the merits until October 4, 1985.
9	Sep 4 1985		Brief amicus curiae of Connecticut filed.
10	Aug 30 1985		Record filed.
11	Sep 18 1985		Motion of petitioner to dispense with printing the joint appendix GRANTED.
13	Oct 2 1985		Order extending time to file brief of respondent on the merits until November 1, 1985.
14	Nov 1 1985		Brief of respondents Sec. of Treasury, et al. filed.
15	Nov 19 1985		CIRCULATED.
16	Nov 21 1985		SET FOR ARGUMENT, Wednesday, January 15, 1986. (2nd case).
17	Dec 11 1985	X	Reply brief of petitioner Marie D. Sorenson, etc. filed.
18	Jan 15 1986		ARGUED.

PETITION FOR WRIT OF CERTIORARI

84-1686 (1)

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1984

MARIE D. SORENSON, on behalf of herself and all others similarly situated,

Petitioner,

v.

THE SECRETARY OF THE TREASURY OF THE UNITED STATES and THE UNITED STATES OF AMERICA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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1064p

Question Presented

This petition presents the following question of statutory interpretation:

> Do 42 U.S.C. § 664 or 26 U.S.C. § 6402 authorize the Secretary of the Treasury to take earned income credit benefits and give them to states as reimbursement for public assistance payments?

The question has been answered in the negative by the Courts of Appeals for the Second and Tenth Circuits; it was answered in the affirmative, in this case, by the Court of Appeals for the Ninth Circuit. Consequently, the Secretary of the Treasury must currently apply these Federal statutes differently in different parts of the country.

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Table of Authorities

Opinions Below

The opinion of the Court of Appeals for the Ninth Circuit is reported at 752 F.2d 1433. The opinion of the District Court for the Western District of Washington is reported at 557 F. Supp. 729.

Jurisdiction

Jurisdiction to review the decision of the Court of Appeals by writ of certiorari is conferred on this Court by 28 U.S.C. § 1254. The decision of the Court of Appeals was filed on February 5, 1985.

Statutes

42 U.S.C. § 664(a):

> Upon receiving notice from a State agency administering a plan approved under this part that a named individual owes past-due support which has been assigned to such State pursuant to section 602(a)(26) of this title, the Secretary of the Treasury shall determine whether any amounts, as refunds of Federal taxes paid, are payable to such individual (regardless of whether such individual filed a tax return as a married or unmarried individual). If

> the Secretary of the Treasury finds that any such amount is payable, he shall withhold from such refunds an amount equal to the past-due support, and pay such amount to the State agency (together with notice of the individual's home address) for distribution in accordance with section 657(b)(3) of this title.

26 U.S.C. § 6402(c):

> The amount of any overpayment to be refunded to the person making the overpayment shall be reduced by the amount of any past-due support (as defined in section 464(c) of the Social Security Act) owed by that person of which the Secretary has been notified by a State in accordance with section 464 of the Social Security Act. The Secretary shall remit the amount by which the overpayment is so reduced to the State to which such support has been assigned and notify the person making the overpayment that so much of the overpayment as was necessary to satisfy his obligation for past-due support has been paid to the State. This subsection shall be applied to an overpayment prior to a person's future liability for an internal revenue tax.

The remaining portions of 28 U.S.C. § 6402 and parts of § 6401 are set forth in the appendix at A-17. The text of 26 U.S.C. § 32 (formerly 26 U.S.C. § 43) is set forth in the appendix at A-85.

Statement of the Case

When a child receives public assistance from a state, the child's custodian must assign to the state any rights to collect child-support payments from a noncustodial parent.[1] In 1981, as part of the Omnibus Budget Reconciliation Act of that year, Congress enacted legislation to assist states in collecting such assigned child-support payments.[2] The new law directed the Secretary of the Treasury to take funds owed to responsible noncustodial parents as "refunds of Federal taxes paid" and to pay the funds to the states entitled to public-assistance reimbursement. It is sometimes referred to as an

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1. 42 U.S.C. § 602(a)(26).

2. Section 2331, Pub.L. No. 97-35, 95 Stat. 860. Parts of § 2331 have been codified at 42 U.S.C. § 664 and 26 U.S.C. § 6402.

"intercept" law because it involves the interception of tax refunds.

Plaintiff Marie Sorenson was affected by the intercept law because she married a man who had a support obligation for a child of a previous marriage.[3] The child had received public assistance from the state of Washington, and consequently, the right to collect child support from Mr. Sorenson had been assigned to the state. This brought any arrearage in Mr. Sorenson's support obligation under the purview of the intercept law. Because of a disability, Mr. Sorenson was unable to work; consequently, he was in arrears in his support payments.

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3. The facts of plaintiff's case have not been disputed. The factual statements recited here, unless another source is given, are based on plaintiff's complaint which was verified by a separate declaration. The case was decided by the District Court on a motion for summary judgment, and the court accepted plaintiff's uncontroverted factual allegations.

Plaintiff and her husband filed a joint Federal income tax return for 1981. All income was from plaintiff's wages and her unemployment compensation benefits. The Sorensons were entitled to a refund and an earned income credit benefit.

The earned income credit benefit is a payment available through the tax refund process to a family with earned income of less than $10,000 a year and with a dependent child. The amount of the benefit is $550 ($500 before 1984) or less depending on the amount of earned income.[4]

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4. See 26 U.S.C. § 32 (set out in the Appendix at A-85). "While the credit benefits are distributed through the tax refund process, a recipient need not have owed or paid any taxes to be eligible." Rucker v. Secretary of the Treasury, 751 F.2d 351, 356 (10th Cir. 1984). "Most of the people who receive [earned income credit benefits] have little or no tax liability; part or all of what they receive exceeds the amounts withheld from their earnings. . . . [T]he earned income credit is in substance an item of social welfare legislation, intended to provide low-income families with 'the very means by which to live' . . . ." In re Searles, 445 F. Supp. 749, 752-53 (D. Conn. 1978). What distinguishes the adults in families eligible for earned income credit benefits is that they are working rather than receiving welfare. See S. Rep. No. 94-36, 94th Cong., 1st Sess. 11,, reprinted in 1975 U.S. Code Cong. & Ad. News 54, 84.

The Secretary initially asserted the authority under the intercept law to withhold all funds owed to the Sorensons up to the amount of Mr. Sorenson's outstanding obligation to the state. Plaintiff challenged that assertion in this action, brought on behalf of a class of non-debtor spouses.[5] Ultimately, (after the hearing

5. Under Washington law, one who marries a noncustodial parent with a child-support obligation is not responsible for the new spouse's support obligation. Van Dyke v. Thompson, 95 Wn.2d 726, 630 P.2d 420 (1981). The district court permitted plaintiff to represent a class defined as follows: "all residents of the State of Washington (1) who have filed joint Federal income tax returns for 1981; (2) whose spouses owe money to the State of Washington for child support; and (3) who were

in the District Court, but before the case was decided) the Secretary changed his position and agreed to recognize that a husband's debt could only be collected from his 50% interest in community property, and that the non-debtor spouse was entitled to the remaining 50% of what the IRS owed the couple. How community income should be treated is no longer in dispute between the parties.

The District Court ruled that, as a matter of due process, the Secretary was obligated to notify affected class members of their right to their 50% community share. It subsequently ordered the Secretary to give such notice when he declined

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entitled to a refund of taxes withheld, not exclusively from their spouses' earnings, or to an earned income credit, all or part of which has been withheld by the Internal Revenue Service under the authority of 26 U.S.C. § 6402 or 42 U.S.C. § 664." 557 F. Supp. at 733, reprinted in the appendix to this petition at A-39.

to do so voluntarily. The Secretary did not appeal the District Court's resolution of the merits of the due process issue, but he appealed from the District Court's judgment on jurisdictional grounds.

The remaining issue addressed by the District Court, and the issue with respect to which review is sought in this Court, relates to the treatment of earned income credit benefits. Plaintiff contends that the intercept law does not authorize the taking of earned income credit benefits. The District Court ruled that it does. Plaintiff appealed from this ruling.

The Court of Appeals affirmed the District Court's judgment on all issues. It held that there was Federal question jurisdiction under 28 U.S.C. § 1331 over the class claims for injunctive and declaratory relief, and that sovereign immunity with respect to those claims was

waived under 5 U.S.C. § 702. It held that there was jurisdiction over plaintiff's individual refund claim under 28 U.S.C. 1346(a)(1). On the merits, it held that the intercept law could be applied to earned income credit benefits.

Why the Writ Should Be Granted

This Court should review the decision of the Court of Appeals because the decision is in direct conflict with decisions of courts of appeals in two circuits, namely, Nelson v. Regan, 731 F.2d 105 (2d Cir.), cert. denied, ___ U.S. ___, 83 L. Ed. 2d 110, 105 S. Ct. 175 (1984), and Rucker v. Secretary of the Treasury, 751 F.2d 351 (10th Cir. 1984). See Sup. Ct. R. 17.1. The issue is one of construction of a Federal statute. The conflicting decisions demonstrate the ambiguity of the

intercept law, and the need for a definitive construction of the law by this Court. The Secretary of the Treasury is currently required to take earned income credit benefits in the Ninth Circuit and prohibited from taking them in the Second and Tenth Circuits. The number of people affected by this inconsistent governmental action is large.[6]

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6. The Memorandum for the Federal Respondents submitted by the Solicitor General in response to a petition for certiorari filed in this Court by a state official in Nelson v. Regan (No. 84-33) contained the following estimate at p. 7 n. 6: "The number of interceptions effected by the IRS is substantial and is increasing each year. We are informed by the IRS that the total annual number of interceptions (rounded to the nearest thousand) for 1982, 1983, and 1984 (through June 25, 1984) were 273,000, 340,000, and 392,000 respectively. We have been further informed that approximately 20% of these intercepted refunds involve an EIC component.

The Omnibus Budget Reconciliation Act of 1981, in which the intercept law was § 2331, was an unprecedented legislative event in recent history.[7] The Act itself occupies 576 pages in the United States Statutes at Large. The provisions at issue here were far from the focus of Congressional attention, and so far as counsel have been able to determine, no member of Congress ever considered the taking of earned income credit benefits in connection with § 2331. It is prudent to

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7. There was a controversy in the summer of 1981 over whether the Administration's "budget" would be considered item by item or as a package. The proponents of the latter approach prevailed. "What followed . . . was the approval of a momentous . . . turn in American public policy before most of the House had even a skimming acquaintance with what it was voting on. The bill that reached the Hill . . . was a 1½-inch stack of unnumbered and pencil-tracked pages, thrown together so hastily that the name and phone number of a woman budget analyst survived forgotten in the fine print." Newsweek, July 6, 1981, p. 20.

construe such a provision narrowly, and to refrain from reading into it authority that its plain language does not justify.

The Second and the Tenth Circuits construed the intercept law narrowly, holding that it applied only to "refunds of Federal taxes paid" and not to earned income credit benefits. Nelson, supra at 110-112 (Appendix at A-76 through A-84); Rucker, supra at 356-57 (Appendix at A-68 through A-75). The Ninth Circuit construed the law broadly to authorize the interception of earned income credit benefits. 752 F.2d at 1440-44 (Appendix at 14-21).

The reading adopted by the Ninth Circuit is neither warranted nor required by the language of the intercept law.[8] Furthermore, it is not consistent with any

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8. The detailed analysis required to fully support this contention is beyond the scope of this petition.

legislative purpose that can reasonably be attributed to Congress. The earned income credit program benefits poor children and provides a work incentive for their parents. Only families with working adults earning low incomes and caring for children are eligible. The intercept law need not and should not be read to frustrate this program by authorizing the taking of funds destined to benefit one poor child in the present, to reimburse a state for support of another poor child in the past.

Conclusion

A writ of certiorari should issue.

Respectfully submitted,

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April 1985

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MARIE D. SORENSON, individually and on behalf of all others similarly situated,
Plaintiff-Appellant,

v.

THE SECRETARY OF THE TREASURY OF THE UNITED STATES; and THE UNITED STATES OF AMERICA,
Defendants-Appellees.

No. 83-3694
83-3702

D.C. No.
CV 82-441C

OPINION

Argued and Submitted February 10, 1984

Filed February 5, 1985

Appeal from the United States District Court
for the Western District of Washington
The Honorable John C. Coughenour, Presiding

SUMMARY

The earned income credit is subject to the intercept program, which allows the Internal Revenue Service (IRS) to transfer tax refunds of parents owing delinquent child support payments to the state. [1]

Plaintiff's husband was indebted to the state due to his failure to make the required child support payments to his children of a prior marriage. When Plaintiff and her husband filed their joint tax return, the IRS withheld payment of the refund in order to credit it against the husband's child support obligation. After failing to obtain a refund from IRS, Plaintiff filed this complaint. The district court held that one-half of the refund could be re-

tained under community property law. The district court, which had granted Plaintiff's motion for certification of a class, also held that the members of the class must be notified of their legal right to a refund. Plaintiff appealed the district court's decision that earned income credits were tax refunds and so were subject to retention. Defendants cross-appealed, raising several jurisdictional and procedural issues.

Subject matter jurisdiction is not limited by 26 U.S.C. § 6305(b) because the newer new tax intercept system differs in operation from the old assessment method of collection. Unlike the assessment method, which involves the collection of the amount certified, the intercept method involves the transfer of funds already in the possession of the government and already owed to the taxpayer. [2] The federal tax exception to the Declaratory Judgment Act does not apply because the issue here is not of tax liability but of the disposition of funds owed to Plaintiff. [3] Since Plaintiff now characterizes her individual action as a tax refund suit and no longer seeks an order requesting that funds be released to the plaintiff class, it is not necessary to decide if a tax refund suit provides an adequate legal remedy that would preclude an injunction. [4] The doctrine of sovereign immunity does not bar this suit because Plaintiff complied with the necessary procedural requirements. In applying 26 U.S.C. § 6532(a)(1), prescribing the proper time to file a suit against IRS, it is the time of the decision to deny a refund, not the time of actual notification, that is controlling. [5] Since Plaintiff no longer seeks a class-wide refund, but only declaratory and injunctive relief, class certification was proper. [6] The earned income credit may be withheld and transferred to the state to satisfy child support obligations because statutes provide that *any* overpayment, including the earned income credit, payable *as a refund* is subject to retention. [7] Since the intercept program applies to any overpayment and the earned income credit has not been expressly excluded by Congress, the Court will not speculate as to Congress' intention. [8]

Affirmed.

COUNSEL

Evergreen Legal Services and Peter Greenfield, Seattle, Washington, for the plaintiff-appellant.

Richard Farber and Jo-Ann Horn, Department of Justice, Washington, D.C., for the defendants-appellees.

OPINION

Before: WRIGHT and HUG, Circuit Judges, and EAST,* District Judge.

HUG, Circuit Judge

This appeal involves a challenge to the manner in which the Secretary of the Treasury has implemented the "tax intercept" program. The tax intercept program authorizes the Secretary to withhold tax refunds owed to parents who have delinquent child support obligations and to transfer those funds directly to the states as reimbursement for expenditures made by the states to support the affected children under the Aid to Families with Dependent Children (AFDC) Program.

Sorenson brought this action on behalf of herself and a class of similarly situated persons, seeking a declaratory judgment, an injunction, and refunds of amounts alleged to be wrongfully withheld. The district judge certified the class, entered a declaratory judgment, and later an injunction requiring certain notice to be provided to the class. The district judge denied a refund to Sorenson and the class. Sorenson appeals and the Secretary cross appeals.

*The Honorable William G. East, Senior United States District Judge for the District of Oregon, sitting by designation.

FACTS

Sorenson is a married woman who lives in the State of Washington. Her husband is indebted to the State for his failure to make the required child support payments to the children of his prior marriage. When the State gave financial assistance to his former wife, the State took an assignment of the past due child support, as it is required to do under the AFDC program. In February, 1982, Sorenson and her husband filed a joint 1981 federal income tax return. All of the income was from Sorenson's wages and unemployment benefits. Sorenson and her husband were to receive a tax refund of $1,408, consisting of excess withheld wages and an earned income credit.

Sorenson did not, however, receive her expected refund. The Internal Revenue Service ("IRS") withheld payment of the refund so that it could be offset against the amount owed to the State of Washington because of her husband's nonpayment of child support. After unsuccessfully trying to obtain her refund from the local office of the IRS and from the Washington State Department of Social and Health Services, to which the IRS referred her, Sorenson filed a complaint in the present action on April 22, 1982. Sorenson sought, among other forms of relief, (1) leave to proceed on behalf of a class, (2) a declaration that the tax intercept statutes do not apply to earned income credits, (3) a declaration that the tax intercept statutes do not authorize the taking of funds withheld from community earnings except from funds withheld from the earnings of an individual having a child support obligation to a state, (4) a declaration that the taking by the IRS of money due to married taxpayers to satisfy child support claims against one spouse constitutes taking of property without due process, and (5) an order requiring that the money owed to class members as refunds or earned income credits and held on the basis of the tax intercept statutes be released to class members.

The Secretary moved to dismiss Sorenson's suit on the grounds that the district court lacked subject matter jurisdiction, that the action was barred by sovereign immunity, and that several procedural limitations pertaining to tax suits precluded the court from granting the relief requested. That motion was denied. Sorenson moved for certification of a class, and that motion was granted. Both parties moved for summary judgment on the substantive issues. The Secretary had originally taken the position that, under Washington community property law, all of the overpayment of tax resulting from the income of Sorenson's husband and one-half of the overpayment resulting from Sorenson's income was to be retained and paid over to the State of Washington for payment of Sorenson's husband's child support obligation. The Secretary later clarified his policy and claimed only one-half of the total community property overpayment. Sorenson contended that, under Washington community property law, it was unlawful for the Secretary to retain and transfer the remaining one-half of the refund resulting from her earnings and that it was contrary to federal law to retain and transfer the remaining one-half of the earned income credit due to her or her husband.

The district court held that, under Washington community property law, the Secretary could properly retain and transfer to the State one-half of the refund resulting from Sorenson's earnings, but that due process required the Secretary to notify other class members that he could only retain one-half of the community property overpayment and, thus, of their legal right to a refund in the instances when more had been retained. The district court further held that the earned income credits were tax refunds within the scope of the intercept statutes and thus could be retained and transferred to the State.

ISSUES

A number of issues were resolved in the district court and are not contested on appeal. We refer to the thorough and carefully written opinion of the district court concerning these issues. *See Sorenson v. Secretary of the Treasury of the United States*, 557 F.Supp. 729 (W.D.Wash. 1982). Our focus in this appeal is only on those issues now raised by the parties.

There is only one issue involved in Sorenson's appeal on behalf of herself and the class certified by the district court. The issue

is whether any of the earned income credit authorized under the provisions of the Internal Revenue Code, 26 U.S.C. § 43 (1982), may be intercepted in the same way as overpayments of taxes that are due to the taxpayer.

In the cross appeal, the Secretary raises several issues. The Secretary contends that:

> 1. The federal court lacks subject matter jurisdiction to review matters concerning the tax intercept system because judicial review is precluded by 26 U.S.C. § 6305(b),
>
> 2. Declaratory relief granted to the class was improper because the Declaratory Judgment Act expressly prohibits granting such relief with respect to Federal taxes,
>
> 3. Injunctive relief granted to the class was improper because the Anti-Injunction Act prohibits restraining the assessment or collection of a tax,
>
> 4. The doctrine of sovereign immunity precludes the refund Sorenson seeks because she failed to follow the prescribed procedural requirements, and
>
> 5. The class certification was improper.

CROSS APPEAL

We discuss first the issues raised on the cross appeal, because these issues involve jurisdictional matters or matters that would otherwise be dispositive of Sorenson's claims.

SUBJECT MATTER JURISDICTION

Section 6305(b)

The Secretary contends that pursuant to 26 U.S.C. § 6305(b) (1982) the federal courts are without jurisdiction to review mat-

ters concerning the tax intercept system. We disagree. The Secretary fails to distinguish between two separate statutory schemes by which he is authorized to collect delinquent child support payments to reimburse the states.

There is an older system of collection, under which the Secretary of the Department of Health, Education, and Welfare is authorized, upon the request of a state, to certify to the Secretary of the Treasury the amount of any child support obligation assigned to that state. *See* 42 U.S.C. § 652(b). Parents are required, as a condition of eligibility for welfare, to assign their rights to support payments to the state, and the support obligation thereby becomes a debt owed by the obligated parent to the state. The Secretary of the Treasury is then required to assess and collect the amount certified "in the same manner and with the same powers, and . . . subject to the same limitations as if such amount were a tax. . . ." 26 U.S.C. § 6305(a). This method is hereafter referred to as the "assessment" method of collection.

...

The second method of collection, and the one at issue here, is the "intercept" method. This scheme also is triggered by the Secretary of the Treasury receiving notice from a state that an individual owes past-due support that has been assigned to the state as a condition of welfare eligibility. The Secretary then determine as whether any amounts are payable to that individual as refunds of federal taxes paid, and he is then authorized to withhold from such refunds an amount equal to the past-due support and to pay that money directly to the state agency to which it is owed. *See* 26 U.S.C. § 6402(c) and 42 U.S.C. § 664. Unlike the "assesssment" method, the "intercept" method involves the transfer of funds already in the possession of the Government and undisputedly already owed to the taxpayer as a refund.

Section 6305(b) provides that

> [n]o court of the United States . . . shall have jurisdiction of any action, whether legal or equitable, brought to restrain or review the assessment and collection of amounts by the Secretary under subsection (a), nor...

> shall any such assessment and collection be subject to review by the Secretary in any proceeding.

26 U.S.C. § 6305(b). The question arises whether this limitation upon federal jurisdiction with respect to the "assessment" method of collection applies also to the "intercept" method at issue in the present case. We hold that it does not. [2]

The "assessment" and "intercept" methods of collection are similar in purpose but not in operation. The very acts upon which section 6305(a) pivots—assessment and collection—have no part in the "intercept" method; and it is precisely these pivotal actions that section 6305(b) shields from federal judicial interference. *See Marcello v. Regan*, 574 F.Supp. 586, 592-94 (D.R.I. 1983). Further, although section 6305(a) was slightly amended in 1981 by the same act of Congress that created the new "intercept" program, Congress did not amend section 6305(b) to refer to the new program. On the contrary, the legislative history of the tax intercept statutes makes only fleeting reference to the "assessment" method, stating merely that the intercept program "amplifies" the Secretary's already existing authority under section 6305(a). H.R. Con. Rep. No. 208, 97th Cong., 1st Sess. 35, *reprinted in* 1981 U.S. Code Cong. & Ad. News 1010, 1347. This reference is no support for the Secretary's contention. The limitation on jurisdiction created by section 6305(b) refers only to "assessment and collection of amounts by the Secretary under subsection (a)" and not to the transfer under section 6402(c) of funds already collected and owed to the taxpayer as a refund.

Declaratory Relief

The Declaratory Judgment Act, 28 U.S.C. § 2201 (1982), authorizes a federal court to grant declaratory relief in a case of actual controversy within its jurisdiction, whether or not further relief is or could be sought. However, the Act expressly prohibits the granting of such relief "with respect to federal taxes." The question in the present case is whether the declaratory relief sought by petitioner is relief "with respect to federal taxes." The district court held that it was not, and we agree. [3]

There was no question in this case with respect to Sorenson's federal tax liability. The question rather concerned the disposition of funds that the Secretary had determined were owed to Sorenson as a refund of taxes withheld and an earned income credit. It was only because the funds were undisputedly owed to petitioner and undisputedly not owed to the United States as taxes that the Secretary proposed to transfer them to the State of Washington.

As this court stated in *State of California v. Regan*, 641 F.2d 721, 722 (9th Cir. 1981),

> [t]he purpose of the federal tax exception to the Declaratory Judgment Act is to protect the government's ability to assess and collect taxes free from pre-enforcement judicial interference, and to require that disputes be resolved in a suit for refund.

(Citation omitted.) The present suit would not interfere with the assessment and collection activities of the IRS since those activities have been completed. We see no reason, therefore, why the federal tax exception to the Declaratory Judgment Act should be applied here.

Injunctive Relief

The district court held that the Anti-Injunction Act, 26 U.S.C. § 7421(a) (1982), which prohibits suits "for the purpose of restraining the assessment or collection of any tax," was inapplicable to the present case. The Secretary does not appeal this ruling but contends instead that injunctive relief was improper because Sorenson had an adequate remedy at law, namely a tax refund suit.

The only injunctive relief granted by the district court was an order requiring the Secretary to notify class members of their right to one-half of the community property overpayment. The court issued a declaratory judgment that class members had a due process right to such notice; and when the Secretary failed to

act on this declaration, the district court ordered him to do so. The Secretary apparently does not seek review of this order, and the district court was correct in any case. Under the circumstances, a tax refund suit would not provide an adequate remedy for a class of plaintiffs who have virtually no means of discovering that they are entitled to such a refund.

Petitioner no longer seeks an order requiring the Secretary to release funds to the plaintiff class, and she now characterizes her individual action as a tax refund suit. This court therefore need not rule on whether a tax refund suit provides an adequate legal remedy that would preclude a court from ordering the Secretary to release the intercepted refunds to the class. [4]

SOVEREIGN IMMUNITY

The Secretary contends that the doctrine of sovereign immunity bars Sorenson's individual refund action on the grounds that she failed to meet the procedural requirements of 26 U.S.C. §§ 6532(a)(1) and 7422(a) (1982). The latter section of the Tax Code provides that no suit may be maintained for the recovery of any internal revenue tax until a claim for a refund has been duly filed with the IRS. The former section prohibits the courts from entertaining any refund suit filed before the expiration of six months from the date the claim for refund is filed, unless the Secretary renders a decision on the claim within that time. Any refund suit instituted prior to the filing of a claim for refund, or after the claim has been filed but prior to the time specified by section 6532, is outside the scope of the Government's consent to be sued and is barred by sovereign immunity. *See, e.g., United States v. Freedman,* 444 F.2d 1387, 1388 (9th Cir.), *cert. denied,* 404 U.S. 992 (1971).

The district court held that "this is not a tax refund suit" and that "sovereign immunity is waived under 5 U.S.C. § 702." *Sorenson,* 557 F.Supp. at 733. Petitioner, however, has recharacterized the relief she seeks. She now concedes that her individual action is a tax refund suit, and she no longer seeks an order requiring the Secretary to release funds to the class. She further

concedes that section 702 does not apply beacause it provides for a waiver of sovereign immunity only in actions seeking relief other than money damages. Since the district court did not regard the present action as a tax refund suit, it did not rule on whether sovereign immunity would bar such a suit. Because we hold that Sorenson's individual action is a tax refund suit, we must reach the question of sovereign immunity.

With respect to the requirement of section 7422(a) that a claim for a refund or credit be filed with the IRS, tax regulations provided that "[a] properly executed . . . income tax return (on 1040X . . .) . . . shall constitute a claim for refund or credit. . . ." 26 C.F.R. § 301.6402-3(a)(5). Sorenson filed such a return in February of 1982. Further, on April 14, 1982, her counsel mailed a letter to the IRS that reiterated her claim that she was entitled to a refund and credit. Since even "an informal claim which fairly gives notice of a taxpayer's intention to press for a refund of taxes is sufficient to satisfy the statutory requirement," *Standard Lime and Cement Co. v. United States,* 329 F.2d 939, 943 (Ct. Cl. 1964); *Rosengarten v. United States,* 181 F.Supp. 275 (Ct. Cl.), *cert. denied,* 364 U.S. 822 (1960), the letter, as well as the filing of Form 1040X, satisfied the claim requirement of section 7422(a).

The provision of section 6532 that a taxpayer may not file a refund action in the courts "before the expiration of 6 months from the date of filing the claim . . . unless the Secretary . . . renders a decision thereon within that time . . . ," 26 U.S.C. § 6532(a)(1), presents a more difficult question. Sorenson's uncontroverted complaint alleges that on April 12, 1982, an IRS representative told her that her refund and credit were being held to satisfy the State of Washington's claim against her husband. Further, on April 22, 1982, the same day that Sorenson filed her complaint in this suit, the Secretary sent her notice that "we have kept all or part of your overpayment" and that the "amount we kept has been paid to the State of Washington." Sorenson contends that either of these communications constituted adequate evidence that the Secretary had rendered an adverse decision on her claim and that she was thereafter entitled to file suit for a refund. The

IRS argues that these exchanges do not constitute notice, that the Secretary had not rendered a decision by April 22, 1982, and that a formal notice of disallowance was not sent to petitioner until June 28, 1982, over two months after she filed suit.

Section 6532(a)(1) provides:

> No suit or proceeding under section 7422(a) for the recovery of any internal revenue tax, penalty, or other sum, shall be begun before the expiration of 6 months from the date of filing the claim required under such section unless the Secretary or his delegate renders a decision thereon within that time, nor after the expiration of 2 years from the date of mailing by certified mail or registered mail by the Secretary or his delegate to the taxpayer of a notice of the disallowance of the part of the claim to which the suit or proceeding relates.

The first portion of the statute sets forth a time *before* which a suit cannot be filed and the latter portion a time *after* which a suit cannot be filed. It is obvious that there are different policy considerations for each requirement. The first portion of section 6532 establishes a six-month period as a reasonable time for the IRS to consider the claim before suit is filed, so that those claims it considers to have merit can be resolved administratively, thereby avoiding needless litigation. However, under the provisions of this section, a suit is not precluded if the IRS renders a *decision* on the claim within that period. The section does not say that suit is precluded until *notice* of that decision is given to the taxpayer. Rather, it is the time of the *decision* that is controlling. [5] This is perfectly logical, in that the purpose of this portion of the statute is served if no suit is filed before the Secretary has made his decision or the six months' reasonable time for doing so has expired. Notice to the taxpayer has no bearing on the policy reasons for this portion of the statute.

The remainder of section 6532 provides for a period of limitations within which the taxpayer must bring his suit. In order for this time period to commence, the latter portion of the statute

provides that the Secretary must mail a notice of the decision by certified or registered mail. It is obvious that basic fairness to the taxpayer requires that he be notified of the time from which his two-year limitations period commences to run.

In the present case, the IRS letter of April 22 to Sorenson stated that all or part of her refund had been withheld and transferred to the State of Washington. This constituted a decision on the claim, which permitted her to file suit to recover the amount withheld and transferred to the State.

CLASS CERTIFICATION

Pursuant to Fed. R. Civ. P. 23(b)(2), the district court certified a class consisting of

> all residents of the State of Washington (1) who have filed joint Federal income tax returns for 1981; (2) whose spouses owe money to the State of Washington for child support; and (3) who were entitled to a refund of taxes withheld, not exclusively from their spouses' earnings, or to an earned income credit, all or part of which has been withheld by the Internal Revenue Service under the authority of 26 U.S.C. § 6402 or 42 U.S.C. § 664.

557 F.Supp. at 733. The court ruled that the requirements of Rule 23(a) had been met and that class-wide declaratory and injunctive relief would be appropriate. *Id.* The Secretary argues that such a class cannot be certified because it is impossible to determine which of the class members, if any, have met the procedural requirements for the maintenance of a tax refund suit. Sovereign immunity would bar refund actions by any class members who had not met the requirements. Sorenson, however, no longer seeks a class-wide refund. The only relief she seeks on behalf of the class is declaratory and injunctive. All class members are entitled to seek such relief because, pursuant to 5 U.S.C. § 702, sovereign immunity is waived with respect to declaratory and injunctive relief. Whether class members individually have met the

procedural requirements for a refund action is therefore irrelevant, and certification of the class was proper. [6]

SORENSON'S APPEAL

Sorenson sought a declaratory judgment on behalf of herself and the class declaring that "earned income credits" authorized by 26 U.S.C. § 43 are not within the purview of 42 U.S.C. § 664(a) (1982) and 26 U.S.C. § 6402(c) (1982) and are, therefore, not subject to retention by the Secretary and transfer to the states as reimbursement for public assistance payments. Sorenson also sought refund of the remaining one-half of the earned income credit withheld in her case. The district court held for the Secretary. We affirm.

A discussion of the related and underlying code sections is necessary in order to place in perspective the legislation here in question.

Statutory Background

The Social Security Act requires that, as a condition of eligibility to receive aid to families with dependent children, the applicant or recipient must assign to the state any rights to support from any other person which have accrued at that time. *See* 42 U.S.C. § 602(a)(26) (1982). Congress enacted the Social Services Amendments of 1974, which amended the Social Security Act and the Internal Revenue Code so as to provide a mechanism to assist the state in collecting these support obligations. Under this statute, the state can certify the amount of a child support obligation that has been assigned to the state and the Secretary of the Treasury will then proceed to assess and collect the obligation for the state in the same manner (with some exceptions) as federal taxes. Social Services Amendments, Pub.L. No. 93-647 §§ 452(b) and 460(b)(1) (1975), 88 Stat. 2337, 2352 and 2358 (42 U.S.C. § 652(b) and 26 U.S.C., § 6305). This procedure does not, however, authorize the Secretary to withhold and transfer to the state any funds held as refunds of federal taxes paid and due to the parent owing the child support. In order to remedy this deficiency, Congress enacted additional amendments to the Social Security Act and the Internal Revenue Code as a part of the Omnibus Budget Reconciliation Act of 1981 (OBRA), Pub.L. No. 97-35, 95 Stat. 357, 860-63 (1981). These amendments, which establish such a procedure, are the statutes here in issue. Section 2331(a) of OBRA amended the Social Security Act by adding a new section, 464(a), codified as 42 U.S.C. § 664. Section 2331(c) amended the Internal Revenue Code by amending 26 U.S.C. § 6402(a) and adding a new section, 26 U.S.C. § 6402(c). The specific provisions of these sections of OBRA are:

> Sec. 464.(a) Upon receiving notice from a State agency administering a plan approved under this part that a named individual owes past-due support which has been assigned to such State pursuant to section 402(a)(26), *the Secretary of the Treasury shall determine whether any amounts, as refunds of Federal taxes paid, are payable to such individual* (regardless of whether such individual filed a tax return as a married or unmarried individual). If the Secretary of the Treasury finds that any such amount is payable, he shall withhold from such funds an amount equal to the past-due support, and pay such amount to the State agency (together with notice of the individual's home address) for distribution in accordance with section 457(b)(3). (Emphasis added.)
>
> Sec. 464(c) Section 6402 of the Internal Revenue Code of 1954 is amended-
>
> (1) by striking out in subsection (a) thereof "shall refund" and inserting in lieu thereof "shall, subject to subsection (c), refunds"; and
>
> (2) by adding at the end thereof the following new subsection: "(c) OFFSET OF PAST-DUE SUPPORT AGAINST OVERPAYMENTS.—The amount of any *overpayment to be refunded to the person making the overpayment* shall be reduced by the amount of any

> past-due support (as defined in section 464(c) of the Social Security Act) owed by that person of which the Secretary has been notified by a State in accordance with section 464 of the Social Security Act. The Secretary shall remit the amount by which the overpayment is so reduced to the State to which such support has been assigned and notify the person making the overpayment that so much of the overpayment as was necessary to satisfy his obligation for past-due support has been paid to the State. This subsection shall be applied to an overpayment prior to its being credited to a person's future liability for an internal revenue tax." (Emphasis added.)

Sorenson argues that these amendments do not authorize the retention and transfer of amounts held as an "earned income credit" because an earned income credit is in the nature of a grant of funds to the recipient through the refund mechanism of the Internal Revenue Code but is not a "refund of Federal taxes paid," specified in section 2331(a), or an "overpayment to be refunded to the person making the overpayment," specified in section 2331(c).

Looking first at the wording of section 2331(a), it is important to note that it does not provide, as Sorenson contends, that only *tax refunds* being held by the Secretary can be retained and transferred. Rather, section 2331(a) provides that "any" amounts payable "as" refunds of federal taxes paid may be retained and transferred. This language does include the earned income credit because it is payable "*as* a refund of Federal taxes paid." The mechanism used for the refund of Federal taxes paid is the method by which the earned income credit is paid. This language of section 2331(a) supports the construction urged by the Secretary, not by Sorenson.

We next turn to the construction of section 2331(c). The language of this section is best understood when placed in the context of the pertinent Internal Revenue Code provisions, 26 U.S.C. §§ 6401 and 6402, which provide in relevant part:

§ 6401 *Amounts treated as overpayments* . . .

(b) Excessive credits.—If the amount allowable as credits under sections 31 (relating to tax withheld on wages) and 39 (relating to certain uses of gasoline, special fuels, and lubricating oil), *and 43 (relating to earned income credit)* exceeds the tax imposed by subtitle A (reduced by the credits allowable under subpart A of part IV of subchapter A of chapter 1, other than the credits allowable under sections 31, 39, and 43), *the amount of such excess shall be considered an overpayment* . . . .

(c) Rule where no tax liability.—An amount paid as tax shall not be considered not to constitute an overpayment solely by rerason of the fact that there was no tax liability in respect of which such amount was paid.

§ 6402. *Authority to make credits or refunds*

(a) General rule.—In the case of any overpayment, the Secretary or his delegate, within the applicable period of limitations, may credit the amount of such overpayment, including any interest allowed thereon, against any liability in respect of any internal revenue tax on the part of *the person who made the overpayment* and shall, subject to subsection (c), *refund any balance to such person.*

(b) Credits against estimated tax.—The Secretary is authorized to prescribe regulations providing for the crediting against the estimated income tax for any taxable year of the amount determined by the taxpayer or the Secretary to be an overpayment of the income tax for a preceding taxable year.

(c) Offset of past-due support against overpayments.—The amount of *any overpayment to be refunded to the person making the overpayment* shall be re-

> duced by the amount of any past-due support (as defined in section 464(c) of the Social Security Act) owed by that person of which the Secretary has been notified by a State in accordance with section 464 of the Social Security Act. The Secretary shall remit the amount by which the overpayment is so reduced to the State to which such support has been assigned and notify the person making the overpayment that so much of the overpayment as was necessary to satisfy his obligation for past-due support has been paid to the State. This subsection shall be applied to an overpayment prior to its being credited to a person's future liability for an internal revenue tax. (Emphasis added.)

Section 6401(b) defines an overpayment and clearly classifies an "earned income credit" as an "overpayment." Section 6402 authorizes the Secretary to dispose of the overpayment. He can, under section 6402(a), credit it against any liability for internal revenue taxes due the federal government on the part of the person who made the overpayment and must refund the balance to that person who made the overpayment unless it is retained for past due support under subsection (c). [7] It is important to note that the only person to whom the Secretary is authorized to refund an overpayment is "the person who made the overpayment."

Section 6402(c) provides that the amount of "*any overpayment to be refunded to the person making the overpayment*" shall be reduced by the amount of any past-due support owed, which is then remitted to the state. Sorenson contends that although the earned income credit is an "overpayment," it is only the type of overpayment that is "*to be refunded to the person making the overpayment*" that can be retained and transferred. This interpretation of the language does not comport with the remainder of the provisions of sections 6401 and 6402. This language in section 6402(c) is the same language used in section 6402(a). If we were to apply Sorenson's construction of the language to section 6402(a), the earned income credit would never be payable at all because no one ever technically made an overpayment. Obviously

the person who is entitled to the payment in either section 6402(a) or (c) is the person considered to have made the overpayment. The reason for the awkwardness of the overpayment language is that a credit really is not an "overpayment," as the term is used in normal usage but, for the purposes of this statutory method of distribution, it is defined as an overpayment and treated as a refund of taxes that have been overpaid. Similarly, the person who receives any credit enumerated in section 6401(b) has not really overpaid it; yet, he or she is the person who is entitled to receive it and is thus considered to be the person who paid it.

It is significant to note that rather than providing any exclusionary language for the earned income credit, Congress provided in the statutory section amending the Social Security Act that the interception applied to "any" amounts payable as tax refunds, OBRA § 2331(a). Furthermore, in the section of the statute amending the Internal Revenue Code, Congress provided that the interception applied to "any" overpayments, OBRA § 2331(c).

It is also significant that an employee can elect to receive the earned income credit from his employer during the course of the year as a negative withholding. *See* 26 U.S.C. § 3507 (1982). Thus, if the employee does not claim it in this fashion, it could be viewed that he has "overpaid" it, in the same sense that in not claiming all his exemptions he has "overpaid" his withholding tax. Technically, in either case, it is the employer, not the employee, who has made the overpayment.

Sorenson argues that the earned income credit should be treated differently because it was really designed by Congress as a grant to assist needy families, and that Congress did not intend that the intercept program apply to such a grant.[1] The first prob-

[1] Actually, it appears from the legislative history that although the earned income credit provides some assistance to needy families, it was not designed as a type of welfare grant, but as a work incentive program, by negating the disincentive of Social Security taxes. Social Security taxes apply to earnings received through wages or salaries, whereas they do not apply to funds received through

lem we have with this argument is that Congress easily could have expressly exempted the earned income credit and did not do so. Secondly, Congress specifically provided in the statute that the intercept program applied to "any" amounts payable through the federal tax refund process. In the face of this rather clear statutory mandate, we conclude that we are not free to speculate that Congress intended otherwise. [8]

We are aware that the published opinions of several courts have reached conflicting conclusions on this issue. *See Rucker v. United States*, No. 83-1804 (10th Cir., Dec. 28, 1984) (earned income credit could not be intercepted); *Nelson v. Regan*, 731 F.2d 105 (2d Cir.) *cert. denied*, _ U.S. _, 105 S.Ct. 175 (1984) (earned income credit could not be intercepted); *Coughlin v. Regan*, 584 F.Supp. 697 (D.Maine 1984) (earned income credit could be intercepted); *Sorenson v. Secretary of the Treasury of the United States*, 557 F.Supp. 729 (D.Wash. 1982) (earned income credit could be intercepted). We believe that the *Nelson* and *Rucker* opinions have misinterpreted the statute by overlooking the fact that the statute provides that the Secretary can intercept not only tax refunds, but any amounts *payable as* tax refunds. Furthermore, we believe these opinions overlook the context in which the implementing amendment to the Internal Revenue Code fits, and that the same "overpayment" language is used in the amendment as is used in the section providing for refunds of any withholding taxes or credits to the taxpayer.

other sources, such as social welfare programs. The purpose of the legislation was to remove the disincentive to work provided by the Social Security taxes that would have to be paid on wages or salaries. *See* S.Rep. No. 36, 94th Cong. 1st Sess. 12, *reprinted in* 1975 U.S. Code Cong. & Ad. News, 54, 63-64, 83-84. It is also obvious from the manner in which the earned income credit operates that it was not a type of welfare grant. The wage earner is entitled to receive an income credit of ten percent of his or her earnings up to $5,000. Thus, a person who earns $5,000 would receive a $500 credit, whereas a person who earns $1,000, and would probably be in greater need, would receive only a $100 credit. The funds that the Secretary would be reaching are in reality more akin to a refund of Social Security taxes than to a type of welfare grant.

From a policy standpoint, it is also worth noting that these funds that the Secretary would be reaching are a lump sum, accumulated through the year, which the taxpayer could have received through his employer under 26 U.S.C. § 3507. This is quite similar to excess withholding taxes that the taxpayer has allowed to accumulate, which clearly can be intercepted. The policy considerations are quite different in intercepting such accumulated year-end funds from the policy considerations in the garnishing of weekly wages that the employee is expecting to receive for current living expenses. In this latter instance, Congress has specifically provided for exemptions of certain amounts of wages and salaries from the assessment and collection process. *See* 26 U.S.C. §§ 6305(a) and 6334(d).

In summary, sections 651-675 of the Social Security Act provide for a comprehensive program to collect past-due child support. The Act passed in 1975 provided that the assessment process used for collecting income taxes could be used to collect the past-due child support. OBRA enhanced the collection power by permitting the Secretary to intercept any amounts payable as refunds of federal taxes paid. Nothing in the language of section 2331 of OBRA, which amended the Social Security Act, exempted or referred to the earned income credit. The portion of OBRA that provided the mechanism for intercepting these funds, section 6402(c) of the Internal Revenue Code, merely used the same terminology, "any overpayment to be refunded to the person making the overpayment," as is used in the other subsections in authorizing the refund of withholding taxes, earned income credits, and other credits to the person entitled to receive them. There is nothing in the language of OBRA or the legislative history of the earned income credit which would indicate that Congress intended that the earned income credit be treated differently than other funds that are classified as "overpayments" and paid as a tax refund. [1]

The judgment of the district court on both the Secretary's cross appeal and Sorenson's appeal is AFFIRMED.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

MARIE D. SORENSON, Plaintiff, vs. THE SECRETARY OF THE TREASURY OF THE UNITED STATES, and THE UNITED STATES OF AMERICA, Defendants.	CIVIL ACTION NO. C84-441C ORDER

THIS MATTER comes on for consideration on plaintiff's motion to amend the Judgment entered on January 17, 1983. Although phrased a motion to amend the Judgment, plaintiff is, in reality, seeking a clarification of the Court's Order of December 28, 1982 and relief in excess of that Order. The Court finds that clarification is necessary and additional relief appropriate and therefore rules as follows:

(1) The class certified consists of all residents of the State of Washington (a) who filed joint federal income tax returns for 1981, and (b) whose spouses owe money to the State of Washington for child support, and (c) who were entitled to either a refund of taxes withheld, not exclusively from their spouses' earnings, or an earned income credit, part or all of which has been held by the Internal Revenue Service under the asserted authority of 42 U.S.C. § 664.

(2) Specific notice should be sent to all class members advising them of their rights to half of the community property overpayment and the procedures necessary to obtain their property.

(3) The parties are directed to confer as to the form of notice. If the parties are unable to agree as to the form of notice, they are at liberty to contact

the Court.

The Clerk of the Court is instructed to send uncertified copies of this Order to all counsel of record.

DATED this 9th day of March, 1983.

/s/ John C. Coughenour
John C. Coughenour
United States District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

MARIE D. SORENSON,	)	CIVIL ACTION
Plaintiff,	)	NO. C82-441C
vs.	)	ORDER ON PENDING MOTIONS
THE SECRETARY OF THE TREASURY OF THE UNITED STATES, and THE UNITED STATES OF AMERICA,	)	
Defendants.	)	

Filed December 28, 1982

[Published at 557 F. Supp. 729]

Plaintiff challenges portions of the Omnibus Budget Reconciliation Act of 1981 which provides a new mechanism for the collection of delinquent child support payments. Under the Act, tax refunds owed to parents having delinquent child support obligations are instead transferred to the states to reimburse the states for expend-

itures they made to support the affected children under the Aid to Familes with Dependent Children ("AFDC") program. Plaintiff challenges these provisions to the extent they authorize the transfer of tax refunds created by her earnings.

FACTS

Plaintiff is a married woman who lives in the State of Washington. Her husband is indebted to the State of Washington for his failure to make required child support payments to the children of his prior marriage. In February of 1982, plaintiff and her husband filed a joint 1981 Federal income tax return. All the income reported was from plaintiff's wages and unemployment benefits. Plaintiff and her husband were to receive a tax refund of $1,408 consisting of excess withheld wages and an earned income credit.

Plaintiff did not, however, receive her expected refund. The Internal Revenue Service ("I.R.S.") withheld payment of the refund so that the refund could be offset against the amount owed Washington State because of her husband's nonpayment of child support. After unsuccessfully trying to obtain her refund from the local office of the I.R.S. and the Washington State Department of Social and Health Services, Office of Support Enforcement ("DSHS"), plaintiff instituted the present action on April 19, 1982. On April 22, the I.R.S. confirmed the information plaintiff received from the local office that all or part of her refund was being withheld to satisfy a past-due support obligation. On June 28, the I.R.S. sent plaintiff "legal notice" that her claim for refund was partially disallowed. Presumably pursuant to Washington community

property law, all of the overpayment of tax resulting from the income of plaintiff's husband and one-half of the overpayment resulting from plaintiff's income was to be retained and transferred to the State of Washington for the payment of plaintiff's husband's support obligation. Defendants later clarified their position, and only claimed one-half of the total community property overpayment.

ISSUES PRESENTED

Plaintiff objects to the retention of half of the tax refund resulting from her earnings and unemployment compensation. She has filed a motion for class certification and for summary judgment. Defendants have filed a motion to dismiss and a motion for summary judgment. The central issues raised by these motions are: (1) whether plaintiff's suit should

be characterized as one involving the collection or assessment of taxes and therefore subject to the legal impediments to suit applicable to tax actions; (2) whether plaintiff's husband has a property interest in his wife's earnings for the purposes of collection of his separate debt of child support; and (3) whether the procedures employed satisfy due process. These inquiries require an examination of the statutory scheme and the relationship between State property law and the collection of Federal taxes.

THE STATUTORY SCHEME

The collection of past-due support payments is a matter of private, State and Federal concern. While Congress believed that the basic responsibility for the collection of child support rested with the States, Congress did envision a more

active Federal role. See S. Rep. No. 93-156, 93rd Cong., 2nd Sess., reprinted in 1974 U.S. CODE CONG. & AD. NEWS 8133, 8150 (hereinafter referred to as "Senate Report"). Two schemes have been enacted for the Federal collection of child support.

Under the first and older system, the States are authorized to use the Federal income tax collection mechanism itself for collecting support payments. Senate Report at 8153. Upon request of a State with an approved State plan, the Secretary of the Department of Health, Education and Welfare is authorized to certify the amount of any child support obligation assigned to that State to the Secretary of the Treasury. 42 U.S.C. § 652(b). Parents, as a condition of eligibility for welfare, are required to assign their rights to support payments to the State

and to cooperate with the State in the securing of support payments from the obligated parent. Senate Report at 8152. The support obligation becomes a debt owed by the obligated parent to the State. Id. at 8153. Upon receiving certification from the Secretary of Health, Education and Welfare of the amount owed to the State by the obligated parent, the Secretary of the Treasury is required to assess and collect that amount "in the same manner, with the same powers, and (except as provided in this section) subject to the same limitations as if such amount were a tax. . . ." 26 U.S.C. § 6305(a). This collection mechanism was intended to be available only in cases in which the State could establish to the satisfaction of H.E.W. that it had made diligent efforts to collect the payments through other processes but without success. Senate

Report at 8153. This method is hereafter referred to as the "assessment" collection method.

The second Federal method of collection is the one presently under challenge. Upon receiving notice from a State child support agency that an individual owes past-due support which has been assigned to the State as a condition of AFDC eligibility, the Secretary of the Treasury is required to determine whether any amounts as refunds of Federal taxes paid are payable to that individual. If any refunds are owed, he is authorized to withhold from such refunds an amount equal to the past-due support. That money is to be paid directly to the State agency, together with notice of the taxpayer's current address. See Omnibus Budget Reconciliation Act of 1981, Pub. L. 97-35, 95 Stat. 357, S. Rep. No. 97-139, 97th

Cong., 1st Sess., reprinted in 1981 U.S. CODE CONG. & AD. NEWS 396, 1347 (hereinafter referred to as "Committee Report"). See also 42 U.S.C. § 464 and 26 U.S.C. § 6402. Thus, unlike the prior system, these provisions authorize the interception and transfer of funds already in the possession of the government. This method is hereafter referred to as the "transfer" collection method.

THE CHARACTERIZATION QUESTION

The characterization of the plaintiff's claim is hotly contested by the parties. Defendants contend that this is a tax refund suit while plaintiff claims this is merely a collection case. The determination of the nature of the plaintiff's claim has a direct impact on the issues of subject matter jurisdiction, sovereign immunity, injunctive and declaratory relief and the propriety of the

maintenance of a class action.

Tax cases in the Federal courts are subject to strict procedural requirements. Suit cannot be begun for the recovery of any tax until six months have expired from the filing of the claim for refund, unless the Secretary of the Treasury disallows the claim within that time. 26 U.S.C. § 6532. See Davis v. Commissioner, 78-1 U.S.T.C. § 9355 (D.S.C. 1978). The six-month requirement may even be applicable if the Secretary subsequently denies the claim after plaintiff had begun suit. See Anderson v. I.R.S. District Director, 79-2 U.S.T.C. § 9519 (E.D. Wis. 1979). Another result in tax cases is that the United States and its officers have not consented to be sued for tax refund actions unless the procedural requirements have been satisfied. See 5 U.S.C. § 702 (sovereign immunity is not waived if another statute

expressly forbids the relief sought). Moreover, except in extremely limited situations, injunctive and declaratory relief are unavailable in the tax context. 26 U.S.C. § 7421(a) prohibits the bringing of suit for the purpose of restraining the assessment or collection of any tax. The Anti-Injunction Act has been given wide reading by the courts. See Bob Jones University v. Simon, 416 U.S. 725 (1974); Zimmer v. Connett, 640 F.2d 208 (9th Cir. 1981). The Declaratory Judgment Act contains a similar exception for suits with respect to Federal taxes. 28 U.S.C. § 2201. Finally, the above jurisdictional and procedural limitations, as well as the general nature of tax cases, would make class certification very problematic.

A support obligation is significantly different from a tax obligation. See Senate Report at 8153 ("support obliga-

tions are not a tax"). Defendants argue, however, that as plaintiff is seeking a return of her tax refund, she is subject to the procedural limitations of a tax refund suit. Moreover, the jurisdictional limitations of 26 U.S.C. § 6305(b) are allegedly applicable to plaintiff's claim. 26 U.S.C. § 6305(b) attempts to preclude the courts of the United States from retaining jurisdiction to review or restrain the Secretary of the Treasury from assessing or collecting amounts under the "assessment" collection method. Although § 6305 makes no reference to the "transfer" collection method under challenge in the present action, defendants rely on language found in the House Conference Report that indicates the second collection method "amplified" prior law. See Committee Report at 604. Finally, the Secretary of the Treasury's own reg-

ulations provide that the past-due support under the "transfer" collection method is to be collected by offset "as if it were a liability for tax imposed by the Internal Revenue Code." Temp. Reg. § 304.6402-1-(a)(1).

The Court must reject the defendant's contentions. First, there is nothing to suggest that the jurisdictional limitations of § 6305(b) are applicable to § 6402. The Treasury Regulations make clear the "[c]ollection by offset under section 6402(c) of this section is a collection procedure separate from the collection procedures provided by section 6305." A similar argument was rejected by the district court in Nelson v. Regan, No. N 82-173 (D. Conn., June 15, 1982) (order denying motion to dismiss). Second, the Court cannot agree with defendants that Congress intended that the assessment and

collection of past-due support obligatons be subject to the procedural limitations of a tax refund suit. Plaintiff is not seeking a tax refund in anything but a purely technical sense. The Internal Revenue Service has calculated the refund owing and that amount is not disputed. Unlike the "assessment" collection method, the Secretary of the Treasury under the "transfer" collection method does no more than retain and then pass on funds to the appropriate State agency. The Secretary does not determine the amount of past-due support owing nor collect any additional funds to satisfy the obligation. In other words, this is not a case where suit would interfere with the assessment and collection activities of the I.R.S. since those activities have already been completed. In fact, the Secretary of the Treasury refers individuals with questions about

the transfer to the local State agency. The Court must conclude that the procedural and jurisdictional limitations of tax refund actions are inapplicable to plaintiff's suit. If Congress wanted these limitations to be applicable to the "transfer" collection method, they would have more clearly demonstrated their intent. See 26 U.S.C. § 6305.

The defendant's motion to dismiss is therefore DENIED. The Court finds that this is not a tax refund suit, that the Anti-Injunction Act and the similar limitations in the Declaratory Judgment Act are inapplicable to the present action, that sovereign immunity is waived under 5 U.S.C. § 702, and that subject matter jurisdiction is found in 28 U.S.C. § 1331-(a).

The Court also finds that certification of plaintiff's proposed class is

appropriate. The class consists of all residents of the State of Washington (1) who have filed joint Federal income tax returns for 1981; (2) whose spouses owe money to the State of Washington for child support; and (3) who were entitled to a refund of taxes withheld, not exclusively from their spouses' earnings, or to an earned income credit, all or part of which has been withheld by the Internal Revenue Service under the authority of 26 U.S.C. § 6402 or 42 U.S.C. § 664. The requirements of Fed. R. Civ. P. 23(a) have been met. There are thousands of potential class members, there are common questions of law and fact, the claims of plaintiff are typical of the class, and plaintiff and her counsel will fairly and adequately protect the interests of the class. Moreover, as plaintiff is not seeking anything but injunctive and declaratory relief and as

defendants have employed their collection method uniformly throughout the class, final class-wide injunctive or declaratory relief is appropriate. Therefore, plaintiff's proposed class is certified pursuant to Fed. R. Civ. P. 23(b)(2).

Having dealt with defendants' procedural objections, the Court must reach the merits of plaintiff's suit.

EARNED INCOME CREDITS

Plaintiff's first claim concerns the language of the applicable statutes. 42 U.S.C. § 664 authorizes the Secretary of the Treasury to withhold "refunds of Federal taxes paid" and transfer these funds to the appropriate State agency to satisfy the debtor's support obligation. 26 U.S.C. § 6402(c) provides that the amount of any "overpayment to be refunded to the person making the overpayment" shall be

reduced by the amount of past-due support. Plaintiff contends that earned income credits are not refunds of Federal tax and are therefore outside of the scope of the statutes. Allowing the Secretary to reach earned income credits would allegedly frustrate the Congressional purpose of benefiting poor children and giving their parents an incentive to work. Finally, plaintiff contends that the term "overpayment" in § 6402(c) should be given its common sense meaning and that since earned income credits can be paid even if no Federal income tax is owed, the credits must have been excluded from the statutes.

Common sense is not, however, a useful guidepost in dealings with the Internal Revenue Code. Words with well-accepted meanings are often adapted by the Code into terms of very specific interpretation. "Overpayment" is a term of art. 26

U.S.C. § 6401(b) provides, in part, that if there are amounts allowable as credits under the earned income credit provisions in excess of Federal income taxes paid, then "the amount of such excess shall be considered an overpayment." It is perfectly consistent that Congress would consider the payments of past-due child support more important than the protection of an earned income credit. The Court finds that earned income credits are within the purview of the statutes and are subject to retention and transfer.

VAN DYKE AND THE WASHINGTON PROPERTY LAW

The impetus for the present lawsuit was the Washington Supreme Court's holding in Van Dyke v. Thompson, 95 Wn.2d 726, 630 P.2d 420 (1981). Plaintiff's husband in Van Dyke owed the State of Washington for past-due child support for children from a

prior marriage. He was unemployed and had no assets. Defendant Secretary of the Department of Social and Health Services served notice on plaintiff's employer to withhold and deliver to DSHS 25 percent of plaintiff's wages to satisfy her husband's obligation. Plaintiff filed suit seeking injunctive and declaratory relief. The Washington Supreme Court held that despite the fact that plaintiff's earnings were community property, they could not be used to satisfy the husband's separate debt. The court's prior holding in Fisch v. Marler, 1 Wn.2d 698, 97 P.2d 147 (1939), that only the earnings of the obligated spouse were subject to garnishment for past child support obligatons was reaffirmed. Plaintiff contends that just as DSHS could not reach the non-obligated spouse's earnings in Van Dyke, so, too, should the tax refund generated by plain-

tiff's earnings be protected from transfer by the Internal Revenue Service.

Defendants assert that Van Dyke is inapplicable. They argue that Van Dyke is limited to the collection of separate debts under State law. They claim the proper analysis is that State law only determines whether the obligated spouse has a property interest in the overpayment created by the earnings of the nonobligated spouse. This determination being made in the affirmative, Federal collection law, not subject to the holding of Van Dyke, provides that the husband's half interest in the tax refund is reachable.

The parties do not dispute that the source of property law is Washington law. Under Washington law, however, the nature of the husband's interest in the earnings of the plaintiff is in some dispute. RCW § 26.16.030 provides that all property not

acquired or owned as prescribed in RCW §§ 26.16.010 and .020 which is acquired after marriage by either husband or wife or both is community property. Separate property is limited to property owned by one of the spouses at the time of marriage or thereafter acquired by gift, devise or inheritance, and the rents, issues and profits thereof. RCW §§ 26.16.010 and .020. There is a presumption that all property obtained during marriage is community property. See Yesler v. Hochstettler, 4 Wash. 349, 30 Pac. 398 (1892). Under these statutes, plaintiff's husband would have a property interest in the tax refund since that refund would be community property.

The problem arises with the application of RCW § 26.16.200. The statute provides that:

> Neither husband or wife is liable for the debts or liabilities of

> the other incurred before marriage, nor for the separate debts of each other, nor is the rent or income of the separate property of either liable for the separate debts of the other: Provided, that the earnings and accumulations of the husband shall be available to the legal process of creditors for the satisfaction of debts incurred by him prior to the marriage, and the earnings and accumulations of the wife shall be available to the legal process of creditors for the satisfaction of debts incurred by her prior to marriage. For the purpose of this section neither the husband nor the wife shall be construed to have any interest in the earnings of the other: Provided Further, that no separate debt may be the basis of a claim against the earnings and accumulations of either a husband or wife unless the same is reduced to judgment within three years of the marriage of the parties.

The Washington legislature added the two provisos in 1969. Prior to 1969, and except in limited cases, Washington followed the marital bankruptcy rule. Immediately upon a debtor's marriage, a creditor lost the ability to enforce his

claim against the new marital community. Watters v. Doud, 92 Wn.2d 317, 322, 596 P.2d 280 (1979). The 1969 amendment with the addition of the provisos was meant "to alleviate the harsh effects of the previous law" and give the creditor three years in which to get payment of the debt or reduce the debt to judgment. Id. See Note, 45 Wash. L. Rev. 191 (1970). It seems clear that the amendment's purpose was to make more of the community assets available for separate creditors. See Cross, The Community Property Law in Washington, 49 Wash. L. Rev. 729, 829-30 (1974). What is not clear is the impact of the characterization of the property. In other words, what effect is to be given to the phrase "[no] interest in the earnings of the other"? Defendants contend that the nature of the tax refund is governed by RCW §§ 26.16.010-030 and that

the refund is, therefore, community property. Plaintiff seems to argue that while the tax refund may be community property for most purposes, for purposes of collection of a separate debt, the property is not community property.

Van Dyke did not address the characterization issue. Van Dyke is a collection case. It held that the earnings of a noncustodial, nonobligated spouse are not subject to the antenuptial obligation of child support. That Van Dyke did not address the issue is not surprising. In terms of State law, there would be no difference between a limitation of property subject to creditors and a determination that an individual did not have a property interest in a particular asset. Either determination would prohibit the creditor subject to State law from reaching the asset. The distinction, however, becomes

critical when Federal law comes into play.

The distinction was made in United States v. Overman, 424 F.2d 1142 (9th Cir. 1970). The issue in Overman was whether the United States could levy on community property to satisfy the separate tax obligation of one of the spouses. Defendants had argued that based on the pre-amended RCW § 26.16.200, the community property was immune from the husband's premarital debt. The Ninth Circuit held, however, that in order for the Government to reach the community property it was only necessary that the obligated spouse have a property interest in the asset. The court went on to hold that even if RCW § 26.16.200 created a limitation on the extent of ownership rights of the obligated spouse, it was of "no moment." If the taxpayer had a property interest in a particular asset, the Government could

reach it. Furthermore, the Government could cause the involuntary conversion of the entire asset, although they were limited to retaining the half interest in the asset of the obligated spouse. This comports with the defendants' actions in the present case where half of the tax refund is retained.

The Court finds that the analysis of Overman controls the characterization issue. Admittedly, the language of the first proviso in RCW § 26.16.200 is troublesome. Also, Overman specifically did not address the statutory amendments. See Overman, 424 F.2d at 1145, n.2. Still, it is undisputed that the tax refund is community property. The creditor limitation is not a matter of substantive property law but only serves to insulate property from the reach of creditors. Exempt status of property under State law

need not bind the Federal collector. See United States v. Mitchell, 403 U.S. 190 (1971); Broday v. United States, 455 F.2d 1097 (5th Cir. 1972). The Court cannot accept plaintiff's assertion of "limited status" property: community property for all purposes except for payment of separate debts.

Even assuming that RCW § 26.16.200 and Van Dyke need not bar defendants from retaining the tax refund, the question remains whether the Washington statute nonetheless precludes retention and transfer in light of Congressional intent. In other words, did Congress intend that property exemptions applicable to Washington State parties (such as Thompson in Van Dyke) be inapplicable to Federal parties?

26 U.S.C. § 6402(c) provides that the amount of any overpayment to be refunded

to the person making the overpayment is to be reduced by the amount of any past-due support owed by that person. Thus, two determinations must be made. First, is there a person who is owed an overpayment? Second, does that person owe past-due support? If so, then the Secretary of the Treasury is directed to reduce the amount of overpayment owed to that individual by the amount of the pastdue support. In our case, it is conceded that plaintiff's husband owes past-due support. Moreover, just as plaintiff's husband would be liable for Federal income taxes generated by plaintiff's community earnings, so, too, would he be entitled to the overpayment created by those community earnings. See Bagur v. Commissioner, 603 F.2d 491 (5th Cir. 1979); Simmons v. Cullen, 197 F. Supp. 179 (S.D. Cal. 1961). Cf. United States v. Merrill, 211 F.2d 297

(9th Cir. 1954). Plaintiff's husband would be owed the overpayment in the same manner as plaintiff. Therefore, retention of the husband's property interest in the overpayment generated by plaintiff's earnings is authorized under the literal language of the statute. Moreover, given the strong Federal policy favoring the collection of past-due support and the intent of Congress in the enactment of the "transfer" collection method to develop a collection method as an alternative to those already available to the States, the Court concludes that Congress did intend that Federal law prevail as to the method of reaching the plaintiff's husband's interest in the overpayment.

DUE PROCESS

Plaintiff's final objection concerns the due process clause of the Fifth

Amendment. Plaintiff contends that she is entitled to notice and an opportunity to be heard in regard to the transfer of the overpayment. Plaintiff emphasizes that she is not a judgment debtor and has not participated in any hearing procedure to determine the existence or the amount of any child support obligation.

In order to evaluate plaintiff's due process challenge, the particular procedures employed by defendants must be examined. There are seven steps to this process. First, a determination must be made that an individual owes child support. See 42 U.S.C. § 664(c). This determination is made by State court or administrative order and is presumably a process in which the obligated spouse has participated. Second, after the obligated spouse has failed to make the child support payments, the State agency notifies

the Secretary of the Treasury that the individual has not paid and that a particular amount is past due. 42 U.S.C. § 664(a). Third, the Secretary of the Treasury determines whether any overpayment is due the named individual. Fourth, if there is any overpayment due, the Secretary is authorized to retain an amount equal to the past-due support and to transfer that amount to the State agency. 42 U.S.C. § 664(a). Fifth, the Secretary is to notify the person making the overpayment that "so much of the overpayment as was necessary to satisfy his obligation for past-due support has been paid to the State." 26 U.S.C. § 6402(c). Sixth, if an additional claim is made to the Internal Revenue Service that the amount withheld is in error, the Service will calculate the obligated spouse's interest in the overpayment and will refund the rest.

Seventh, if the parties object to the recalculation, they are informed that they may file suit in the appropriate Federal court.

Two notices have been sent to plaintiff. The first informed her that her overpayment had been paid to the State of Washington to fully or partially satisfy a prior support obligation. The notice directed questions about the obligation to the Department of Social and Health Services in Olympia, Washington. The notice did not indicate that only half of the overpayment created by community earnings would be retained. Instead, it stated that if no other Federal taxes were owed, a refund check for any remaining balance would be issued. The second notice was sent during the pendency of the present action. It stated that pursuant to Washington community property law, half of the

claim for refund was allowed. If plaintiff contested the amount, she could bring suit in the appropriate Federal District Court or the Court of Claims.

There can be little doubt that plaintiff has a property interest in the overpayment. Defendants concede that they may retain only half of the overpayment generated by community earnings. Nonetheless, they retain the full overpayment until an additional claim for refund is made. Placing the onus on the taxpayer to file a claim for a refund is allegedly necessary because "it is impossible for the Internal Revenue Service to make a prior determination of the proper allocation." As the determination simply consists of calculating the community interest in the overpayment and dividing by two, the Court strongly questions the impossibility of a prior conclusion. Even assuming the

impossibility of such a result, there is no reason for the notice sent to plaintiff and her class not informing the nonobligated spouses that only half of the community property overpayment would be retained.

Due process requires "notice reasonable calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." Mullane v. Central Hanover Bank & Trust Co., 399 U.S. 306, 314 (1949). One of the fundamental purposes of notice is to alert individuals that their interests are being affected and to permit adequate preparation to challenge those activities. See Memphis Light, Gas and Water Division v. Craft, 436 U.S. 1 (1978); Transco Security, Inc. of Ohio v. Freeman, 639 F.2d 318 (6th Cir.), cert. denied, 102

S.Ct. 101 (1982). See also Holbrook v. Pitt, 643 F.2d 1261 (7th Cir. 1981) (due process requires that tenants receive notice of their right to receive retroactive payments). Without informing plaintiff and her class that only half of the community overpayment need be retained and that all would be retained unless an additional claim was asserted, defendants have made it at best onerous and at worst virtually impossible for individuals in plaintiff's position to obtain their uncontested share of the refund. If anything, the notice sent seems to imply that all of the overpayment would be retained regardless of its community or separate property nature. It is uncontested that the Department of Social and Health Services, the agency designated on the notice which would answer any questions, did not inform plaintiff, or anyone else

submitting declarations in this lawsuit, that only half of the community overpayment need be retained. Considering that Washington is an "item" theory community property state and that each spouse has an undivided one-half interest in every community asset, see In re Coffey's Estate, 195 Wash. 379, 81 P.2d 283 (1938), and in light of recent Washington developments in regard to the availablity of community assets for separate debts, see deElche v. Jacobsen, 95 Wn.2d 237, 622 P.2d 835 (1980), even assuming the nonobligated spouse was aware of the impact of community property law on the overpayment, believing that defendants could retain the entire amount would not be an unreasonable conclusion.

The Court must find that the notice is insufficient to apprise the nonobligated spouse of their right to at least half of

the community overpayment. Under the standard adopted by the Supreme Court in Mathews v. Eldridge, 424 U.S. 319, 335 (1976), no other result is possible. The private interest, that is, the interest of people in plaintiff's position receiving their uncontested share of the community overpayment, is significant. The risk of erroneous deprivation of such interest through the procedures used is substantial for individuals in plaintiff's class. The probable value of additional or substitute procedural safeguards is great considering that the defendants will not refund any of the overpayment absent an additional claim. Finally, the Government's interest in not providing the notice is small. The cost of adding one line to the present notice must be minimal. Even agreeing with defendants that calculation of the refundable interest of the nonobligated

spouse absent an additional claim is impossible, a simple notice informing that spouse that an additional claim is necessary in order to obtain any overpayment is not only possible but obligatory. The Court assumes that after the additional claim for refund is made, defendants will promptly send the uncontested half of the community overpayment.

Plaintiff also seeks some form of hearing procedure where she may contest the retention of the overpayment. Presumably, a hearing would not be necessary regarding the undisputed half of the community overpayment for that half should be returned as soon as it has been calculated. Plaintiff's hearing request focuses on the contested half of the overpayment. At the hearing, plaintiff and people in plaintiff's position would raise both legal and factual defenses to the assess-

ment.

To the extent a hearing is requested to assert the earned income credit and Van Dyke arguments discussed supra, no hearing would be required. Those being the only legal issues asserted by plaintiff, the Court concludes that a hearing to challenge the legality of the retention is not necessary. Plaintiff additionaly asserts that a hearing is necessary to challenge the amount of retention. Specifically, she requests a proceeding where she could litigate the issue of ability to pay.

There is something uniquely inappropriate in involving the Federal Government in such a hearing. 42 U.S.C. § 664 and 26 U.S.C. § 6402 did, to a limited extent, put the Federal Government in the child support collection business. Those sections have not, however, resulted in an abandonment of the scheme whereby the

States have the primary responsibility in the collection process. Under the "transfer" collection method, the defendants do no more than retain and transfer an amount certified by a State agency. They make no determinations of liability and ability to pay. It was the conduit nature of defendants' involvement which necessitated finding the "transfer" collection method was not subject to the procedural and jurisdictional limitations of a tax suit.

Plaintiff's argument does have some equitable appeal. Plaintiff was not a party to the proceeding where the support obligation was set nor was that obligation one owed by her. There are, however, proceedings available for someone in plaintiff's position to challenge the amount of the determination. See RCW § 26.09.170 (modification of decree of child support) and WAC § 388-11-140 (modifica-

tion of administrative determination of support). At either proceeding the arguments of inability to pay and other factual defenses can be raised. Considering the existence of these other proceedings and the lack of Federal participation in the determination of the amount of child support, no additional hearings are required.

For the above-stated reasons, the Court finds and rules as follows:

1. Defendant's motion to dismiss is DENIED. The Court has subject matter jurisdiction and sovereign immunity is waived. The procedural limitations of a tax suit are deemed inapplicable to the present action.

2. Plaintiff's motion for class certification is GRANTED.

3. The cross-motions for summary judgment are GRANTED in part and DENIED in

part. The Court finds that earned income credits are within the scope of the statutes. The Court also concludes that the limitations of Van Dyke are inapplicable to the Federal collector. Due process, however, requires that the notice of the overpayment being retained inform the individuals that only half of the community property overpayment will be retained if an additional claim for that half is made. Besides adequate notice, no additional proceedings are required by due process.

The Clerk of this Court is instructed to enter Judgment pursuant to this Order and to send uncertified copies of this Order and of the Judgment to all counsel of record.

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

DALLEEN RUCKER,

Plaintiff-Appellant,

KATHY WARNER,

Intervenor-Appellant,

v.

THE SECRETARY OF THE TREASURY OF THE UNITED STATES, and THE UNITED STATES OF AMERICA,

Defendants-Appellees,

ROSA ORTEGA, Intervenor.

NO. 83-1804

OPINION

Filed December 28, 1984

[Published at 751 F.2d 351]

EARNED INCOME CREDIT
WITHOLDING

As noted above, 42 U.S.C. § 664(a) authorizes the Secretary of the Treasury to withhold "refunds of federal taxes paid" which are due to an obligated spouse. In addition, 26 U.S.C. § 6402(c)

provides that the amount of any "overpayment to be refunded to the person making the overpayment" shall be reduced by the amount of past-due child support. Rucker asserts that the earned income credit is neither a "refund of federal taxes" nor an "overpayment" within the meaning of these two statutory provisions, and thus is not subject to withholding in the intercept program.

The earned income credit is a benefit available to certain families with dependent children and with an earned family income of less than $10,000 per year. See 26 U.S.C. § 43 (1982). The maximum credit allowed is $500. It is reduced proportionately as the adjusted gross family income increases above $6000, dropping to zero at $10,000. It was designed to provide relief to low income families who pay little or no income tax, and it was in-

tended to provide an incentive for low income people to work rather than to receive federal assistance. See S.Rep. No. 94-36, 94th Cong., 1st Sess. 11 (1975), reprinted in 1975 U.S.Code Cong. & Ad.News 54, 63-64. While the credit benefits are distributed through the tax refund process, a recipient need not have owed or paid any taxes to be eligible. See Nelson, 731 F.2d at 109; In re Searles, 445 F.Supp. 749, 752-53 (D.Conn. 1978). A refund of federal taxes is a repayment of money paid a taxpayer in excess of that taxpayer's liability. Although the earned income credit is given effect through the income tax return, the credit is not a tax refund because eligibility for the credit is not contingent upon payment of any federal income tax. Id.; In re Hurles, 31 B.R. 179, 180 (Bankr.S.D.Ohio 1983). Section 664(a), which authorizes interception

only of "refunds of federal taxes paid," does not itself authorize interception of the earned income credit.

Defendants argue, however, that while section 664(a) may not authorize the withholding of earned income credits, such withholding is expressly authorized by section 6402(c) of the Internal Revenue Code because the earned income credit is an "overpayment" subject to interception. They point out that section 6401 of the Internal Revenue Code, 26 U.S.C. § 6401, defines "overpayment" to include the excess of an earned income credit over tax laibility, and that this excess exists even when there is no tax liability.[8]

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[8]. 26 U.S.C. § 6401 provides in pertinent part: (b) If the amount allowable as credits under section...43 (relating to earned income credit) exceeds the tax imposed by subtitle A... the amount of such excess shall be considered an overpayment."

Rucker counters that because section 6402(c) only authorizes an offset against an "overpayment" that can be withheld under section 6402(c).

Courts that have faced this issue have reached conflicting results. Compare Nelson, 731 F.2d at 111-12 (the earned income credit is not subject to interception under 26 U.S.C. § 6402(c) with Coughlin, 584 F.Supp. at 706-07 (26 U.S.C. § 6402(c) authorizes interception of the earned income credit), and Sorenson, 557 F. Supp. at 733-34 (W.D. Wash. 1983) (same). For the reasons set forth below, we believe the Second Circuit's decision in Nelson is the better view.

As the Nelson court notes, the term "overpayment," broadly defined in section 6401 but limited in section 6402 by the phrase "to be refunded to the person making the overpayment," is ambiguous with

regard to the earned income credit. Section 6401 is a general provision in the chapter on Abatements, Credits, and Refunds of the Internal Revenue Code, governing the tax refund process. See Nelson, 731 F.2d at 111. Section 6402(c) and section 664(a), on the other hand, were both enacted as part of the Omnibus Act, which established the tax intercept program. Id. Interpreting the term "overpayment" in section 6402(c) so as not to include the earned income credit results in consistency with section 664(a) which authorizes only withholding of federal tax refunds. Moreover, we believe that this interpretation furthers the congressional purpose in enacting the earned income credit. Reducing the amount of the earned income credit due to a low income working family would reduce the family members' incentive to work, and would frustrate the

congressional goals of providing relief to low income families, encouraging work, reducing dependence on federal assistance, and stimulating the economy. See id. at 111-12 cf., In re Searles, 455 F.Supp. at 752-53 (discussing the adverse effects of including the credit in a bankrupt's property).

Defendants claim and the district court agreed, that the tax intercept program's goal of enforcing child support obligations should take priority over the policies underlying the earned income credit. See Rucker, 555 F.Supp. at 1053. We are not persuaded. The intercepted funds are not paid to support the obligated taxpayer's child but to reimburse a state for its support of that child in the past. The earned income credit, on the other hand, directly benefits the dependent children of the low income tax-

payer. In the absence of evidence that Congress intended such a substantial cutback on the earned income credit program, we interpret the intercept legislation before us so as to avoid both conflict between the provisions of the Omnibus Act and a result clearly at odds with the goals of the earned income credit program. We hold that 26 U.S.C. § 6402 and 42 U.S.C. § 664 do not authorize the withholding of any portion of the earned income credit due an otherwise eligibile recipient.

The judgment is reversed and remanded to the district court for further proceedings.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ELINOR NELSON, Douglas Spells, Dennis Eaton, Phillip Corso, individually and on behalf of those similarly situated,

Appellees,

v.

DONALD REGAN, Secretary of the United States Department of Treasury; Margaret M. Heckler, Secretary of the United States Department of Health and Human Services; and Ronald Manning, Commissioner of the Department of Human Resources of the State of Connecticut,

Appellants.

OPINION

Filed March 13, 1984.

[Published 731 F.2d 105]

. . . .

The district court also held that the tax intercept program does not apply to refunds or payments of earned income credits. The earned income credit was first enacted as section 204(a) of Pub.L. 94-12,

the Tax Reduction Act of 1975, 26 U.S.C. § 43 (1976). As originally enacted, it allowed a credit in an amount equal to 10% of the first $4,000 earned by eligible individuals. To be eligible for the credit, a person had to have a dependent child residing with him or her.

The purpose of the credit was to provide a "work-bonus" for families who pay little or no income tax, are the most hurt by rising food and energy costs, and are subject to the social security payroll tax. S.Rep. No. 94-36, 94th Cong., 1st Sess. 11 (1975), reprinted in 1975 U.S. Code Cong. and Ad. News 54, 63-64. The credit was intended to provide an incentive for low income people to work rather than to receive federal assistance. It was also hoped that the credit would stimulate the economy because low income people were "expected to spend a large frac-

tion of their increased disposable incomes." S.Rep. at 11, reprinted in U.S. Code Cong. & Ad.News at 64.

The difficult technical question we have before us is whether earned income credits are includable in the amount of the refund against which delinquent support payments may be offset under the intercept program. The district court, holding that the congressional purposes would be under cut if the credit were intercepted, read the word "overpayment," broadly defined in 26 U.S.C. § 6401,[4] to be limited in 26 U.S.C. § 6402, supra

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4. 26 U.S.C. § 6401 (1976 & Supp. V 1981) provides as follows: Amounts treated as overpayments

(a) Assessment and collection after limitation period.

The term "overpayment" includes that part of the amount of the payment of any internal revenue tax which is assessed or collected after the expiration of the period of limitation properly applicable thereto.

(b) Excessive credits

note 1, by the phrase "overpayment to be refunded to the person making the overpayment," along with the less inclusive phrase used in section 464 of the Social Security Act, supra note 1. The court noted that the provisions of 26 U.S.C. § 6402 and 42 U.S.C. § 664, but not 26 U.S.C. § 6401, were part of section 2331 of the Omnibus Budget Reconciliation Act of 1981, which established the tax intercept program. The court noted that in

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If the amount allowable as credits under sections 31 (relating to tax withheld on wages) and 39 (relating to certain uses of gasoline, special fuels, and lubricating oil), and 43 (relating to earned income credit), exceeds the tax imposed by subtitle A (reduced by the credits allowable under subpart A of part IV of subchapter A of chapter 1, other than the credits allowable under sections 31, 39, and 43), the amount of such excess shall be considered an overpayment. . . .

(c) Rule where no lax liability

An amount paid as tax shall not be considered not to constitute an overpayment solely by reason of the fact that there was no tax liability in respect of which such amount was paid.

contrast section 6401 was a general provision in the chapter on Abatements, Credits and Refunds of the Internal Revenue Code, governing the tax refund process. See 560 F.Supp. 1110-11. But see Sorenson v. Secretary of Treasury, 557 F.Supp. 729, 734 (N.D. Wash. 1982), (reaching conclusion that refunds due to earned income credit are subject to interception), appeal docketed, No. 83-3694 (9th Cir. Feb. 10, 1984).

We agree with Judge Burns. The statement by the Sorenson court, that the term "overpayment" is a "word of art," id., does not meet Judge Burns' argument. Moreover, section 6402(c) expressly relates back to section 464 of the Social Security Act, which states that the Secretary of the Treasury shall determine whether any amounts "as refunds of Federal taxes paid" are payable to the taxpayer.

42 U.S.C. § 664(a). Section 464(a) then goes on to refer to withholding "from such refunds" an amount equal to the past due support. Read together these two statutes support the district court's conclusion that the intercept provisions do not relate to earned income credits. This conclusion is fortified, as the district court pointed out, by the social welfare needs that Congress sought to meet in enacting the earned income credit.

Concededly, however, the question before us is a close one. We recognize that in the definition of "overpayment" in section 6401(b) of the Code, supra note 4, express reference is had to the earned income credit for the purposes of computing an overpayment. We also take due note that 26 U.S.C. § 6401(c) provides that "an amount paid as tax shall not be considered not to constitute an overpayment solely by

reason of the fact that there was no tax liability in respect of which such amount was paid." (Emphasis supplied.)

We are also aware that our decision involves treating an earned income credit as an "overpayment" for some purposes though not for purposes of the tax intercept statutes. Logic and symmetry have never been the hallmarks of the Internal Revenue Code and Social Security Act, however. Given the option provided by the congressional language of Internal Revenue Code section 6401, on the one hand, and section 6402 of the Code, coupled with section 464 of the Social Security Act, on the other, we believe that the latter more appropriately accords with the congressional purpose in enacting the earned income credit. As pointed out by Judge Blumenfeld in holding that the earned income credit is not "property" of a bankrupt under the Bankruptcy Act:

> The values, variables and mechanisms expressed and enacted by the Congress- . . . lead me to conclude unhesitantly that the earned income credit is not a tax refund. It is an overpayment made to low-income taxpayers to help them meet basic costs of life.

In re Searles, 445 F.Supp. 749, 755 (D.Conn.1978).[5]

Judgment affirmed.

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5. Judge Blumenfeld reasoned in part as follows:

> When originally enacted, the earned income credit was to be taken into account as "other income" under the Social Security Act and thus would cause a reduction in payments of aid to families with dependent children for the month in which it was to be received. See S.Rep. No. 94-36 [94th Cong., 1st Sess.], at 35, reprinted in [1975] U.S.Code Cong. & Admin. News 54, 85-86. Congress later enacted § 2(d) of the Revenue Adjustment Act of 1975, providing that funds received under I.R.C. § 43
>
> "shall not be taken into account as income or receipts for purposes of determining. . . eligibility. . . or the amount or the extent of benefits or assistance, under any Federal program or under any state or local program financed in whole or in part with

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Federal funds, but only if [the taxpayer] ...is a recipient of benefits or assistance under such a program for the month before the month in which such refund is made." Pub.L. No. 94-164, § 2(d), 89 Stat. 970, 972 (1975).

Thus Congress indicated that needy families should receive the earned income credit in addition to any public assistance they are eligible to receive at the time the credit is paid. This distinguishes the earned income credit from all other tax "refunds," which are considered "other income" for purposes of calculating eligibility for public assistance, and further emphasizes the importance to Congress of stimulating spending, supporting needy families, and providing an incentive to work through the earned income credit.

445 F.Supp. at 753.

26 U.S.C. § 32. Earned Income

(a) Allowance of credit.—In the case of an eligible individual, there is allowed as a credit against the tax imposed by this subtitle for the taxable year an amount equal to 11 percent of so much of the earned income for the taxable year as does not exceed $5,000.

(b) Limititation.—The amount of the credit allowable to a taxpayer under subsection (a) for any taxable year shall not exceed the excess (if any) of—

(1) $550, over

(2) 12 2/9 percent of so much of the adjusted gross income (or, if greater, the earned income) of the taxpayer for the taxable year as exceeds $6,500.

(c) Definitions.—For purposes of this section—

(1) Eligible individual.—

(A) In general.—The term "eligible individual" means an individual who, for the taxable year—

(i) is married (within the meaning of section 143) and is entitled to a deduction under section 151 for a child (within the meaning of section 15(e)(3)) or would be so entitled but for paragraph (2) or (4) of section 152(e),

(ii) is a surviving spouse (as determined under section 2(a), or

(iii) is a head of a household (as determined under subsection (b) of section 2 without regard to subparagraphs (A)(ii) and (B) of paragraph (1) of such subsection).

(B) Child must reside with taxpayer in the United States.—An individual shall be treated as satisfying clause (i) of subparagraph (A) only if the child has the same principal place of abode as the individual for more than one-half of the taxable year and such abode is in the United States. An individual shall be treated as satisfying clause (ii) or (iii) of subparagraph (A) only if the household in question is in the United States.

(C) Individual who claims benefits of section 911 or 931 not eligible individual.—The term "eligible individual" does not include an individual who, for the taxable year, claims the benefits of—

(i) section 911 (relating to citizens or residents of the United States living abroad),

(ii) section 931 (relating to income from sources within possessions of the United States).

(2) Earned income.—

(A) The term "earned income" means—

(i) wages, salaries, tips, and other employee compensation, plus

(ii) the amount of the taxpayer's net from self-employment for the taxable year (within the meaning of section 1402(a)).

(B) For purposes of subparagraph (A)—

(i) the earned income of an individual shall be computed without regard to any community property

laws,

(ii) no amount received as a pension or annuity shall be taken into account, and

(iii) no amount to which section 871(a) applies (relating to income of nonresident alien individuals not connected with United States business) shall be taken into account.

(d) Married individuals—In the case of an individual who is married (within the meaning of section 143), this section shall apply only if a joint return is filed for the taxable year under section 6013.

(e) Taxable year must be full taxable year.—Except in the case of a taxable year closed by reason of the death of the taxpayer, no credit shall be allowable under this section in the case of a taxable year covering a period of less than 12 months.

(f) Amount of credit to be determined under tables.—

(1) In general.—The amount of the credit allowed by this section shall be determined under tables prescribed by the Secretary.

(2) Requirements for tables.—The tables prescribed under paragraph (1) shall reflect the provisions of subsections (a) and (b) and shall have income brackets of not greater than $50 each—

(A) for earned income between $0 and $11,000, and

(B) for adjusted gross income between $6,500 and 11,000.

(g) Coordination with advance payments of earned income credit.—

(1) Recapture of excess advance payments.—If any payment is made to the individual by an employer under section 3507 during any calendar year, then the tax imposed by this chapter for the individual's last taxable year beginning in such calendar year shall be increased by the aggregate amount of such payments.

(2) Reconciliation of payments advanced and credit allowed.—Any increase in tax under paragraph (1) shall not be treated as tax imposed by this chapter for purposes of determining the amount of any credit (other than the credit allowed by subsection (a)) allowable under this subpart.

(h) Reduction of credit to taxpayers subject to alternative minimum tax. —The credit allowed under this section for the taxable year shall be reduced by the amount of tax imposed by section 55 (relating to alternative minimum tax for taxpayers other than corporations) with respect to such taxpayer for such taxable year.

OPPOSITION

BRIEF

No. 84-1686

In the Supreme Court of the United States

OCTOBER TERM, 1984

MARIE D. SORENSON, ETC., PETITIONERS

v.

SECRETARY OF THE TREASURY OF THE UNITED STATES AND THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS

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QUESTION PRESENTED

Whether an amount due to be refunded to an individual because of an earned income credit constitutes an "overpayment" within the meaning of Section 6402(c) of the Internal Revenue Code, such that it may be intercepted by the IRS and applied toward the individual's past-due child support obligations.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A21) is reported at 752 F.2d 1433. The orders of the district court (Pet. App. A22-A67) are reported in part at 557 F. Supp. 729.

JURISDICTION

The judgment of the court of appeals was entered on February 5, 1985. The petition for a writ of certiorari was filed on April 24, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This case involves the so-called "tax refund intercept" program. Under this program, federal tax refunds due to persons who have failed to make child support payments, the rights to which have been assigned to a state that has

provided aid to the needy individuals, are "intercepted" by the IRS on the state's behalf and remitted to it.[1] In this manner, the state is reimbursed, at least in part, for the cost of furnishing support that the delinquent parent neglected to provide.

Petitioner is a married woman who lives in the State of Washington. Her husband is indebted to the State because of his failure to make child support payments to the children of his prior marriage (Pet. App. A26). When the State gave financial assistance to his former wife, it took an assignment of the latter's child support rights, as it was required to do under the AFDC program. Pet. App. A4; see 42 U.S.C. 602(a)(26).

In February 1982, petitioner and her husband filed a joint federal income tax return for 1981. All the income reported on the return was from petitioner's wages; her husband had no income during 1981 (Pet. App. A26). On the return petitioner and her husband claimed a refund of $1,408, consisting of excess withheld wages and an "earned income credit." *Ibid.*; see I.R.C. § 43. They did not receive the expected refund. The IRS withheld payment so that the refund could be offset against the amount petitioner's husband owed the State of Washington as a result of his failure to pay child support (Pet. App. A4).

On April 14, 1982, petitioner filed an informal claim for refund with the IRS, requesting that the $1,408 be released (Pet. App. A11, A27). The IRS ultimately notified her that her claim had been allowed to the extent of her one-half interest in the funds under Washington

[1]The principal provisions comprising the intercept program are Section 464 of the Social Security Act, 42 U.S.C. 664, and Section 6402(c) of the Internal Revenue Code of 1954 (26 U.S.C.). Both provisions were enacted as part of the Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, § 2331, 95 Stat. 860.

community property law, but that the other half of the refund, representing her husband's community share, had been retained for payment to the State (*id.* at A5, A11-A12). The notice said that, if petitioner contested the amount of the refund, she could bring suit in the Claims Court or the appropriate district court (*id.* at A57-A58).

2. After receiving informal notification that her claim had been partially denied, petitioner brought this action in the United States District Court for the Western District of Washington (Pet. App. A12-A13). She contended, inter alia, that a refund attributable to an earned income credit is not an "overpayment" of tax and hence is not subject to interception for past-due child support. See I.R.C. § 6402(c). On behalf of herself and her husband, she requested that the intercepted half of the earned income credit be released (Pet. App. A10-A13, A41-A43). She also sought certification of the suit as a class action and requested, on behalf of herself and the class, injunctive relief and a declaration that earned income credits are outside the purview of the tax refund intercept program (Pet. App. A13-A14).[2]

The district court rejected various procedural and jurisdictional arguments interposed by the government (Pet. App. A33-A39),[3] and certified the case as a class action (*id.*

[2]More broadly, petitioner also argued that no portion of the refund — *i.e.*, neither the part attributable to the earned income credit nor the part attributable to excess withholding from her wages — was subject to interception, contending that the refund, flowing from her earnings, could not be garnished to satisfy her spouse's separate, pre-marital debts under Washington community property law (Pet. App. A43-A44). The district court rejected this argument, holding that the IRS could reach her husband's interest in the community overpayment (*id.* at A45-A54), and petitioner did not renew this state-law contention on appeal.

[3]These arguments were based chiefly on the Anti-Injunction Act, the tax exception to the Declaratory Judgment Act, procedural limitations on refund suits, and sovereign immunity (Pet. App. A33-A39). To the

at A41).[4] On the merits, the court granted summary judgment for the government on the earned income credit issue, holding that, under the plain terms of the relevant statutes, earned income credits are deemed to be "overpayments" and hence are subject to interception in the same manner as actual overpayments of tax (*id.* at A41-A43, citing I.R.C. §§ 6401(b), 6402(c)).[5]

3. The court of appeals affirmed the district court in all respects (Pet. App. A1-A21). On the earned income credit issue, petitioner argued that such a credit is neither a "refund[ ] of Federal taxes paid" (42 U.S.C. 664(a)) nor an "overpayment to be refunded" (I.R.C. § 6402(c)), but rather is in the nature of a grant of funds through the refund mechanism of the Internal Revenue Code (Pet. App. A16). She emphasized that persons with no federal tax liability are eligible to receive earned income credits.

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extent the government renewed these arguments on appeal, the Ninth Circuit rejected them (*id.* at A6-A13), and we are not seeking review of those questions here.

[4]The class consists of all residents of the State of Washington who are situated similarly to petitioner and who filed joint federal income tax returns for 1981 (Pet. App. A40). Although the government opposed class certification in the courts below, we are not seeking review of that question here.

[5]Although the district court rejected petitioner's argument that earned income credits are immune from interception, it noted that the IRS is entitled to retain only that portion of the overall refund (including the credit) that belongs to the spouse whose child-support payments are in arrears (Pet. App. A58). The district court agreed with petitioner that nonobligated spouses might be unable to protect their rights absent notice of this fact, and ordered the IRS to provide "adequate notice" to all class members (Pet. App. A61-A63, A67). The district court rejected petitioner's remaining due process claims (*id.* at A63-A66). The government did not appeal the notice issue, and no due process question is raised here.

The court of appeals unanimously rejected petitioner's argument (Pet. App. A14-A21). It pointed out that the relevant provision of the Social Security Act permits interception, not of "tax refunds," but of "any amounts, *as refunds* of Federal taxes paid, [which] are payable" to a person delinquent in child support (*id.* at A15-A16, quoting 42 U.S.C. 664(a) (emphasis added by court of appeals)). And it pointed out that, while Section 6402(c) of the Internal Revenue Code authorizes interception of "any overpayment to be refunded," the Code also provides that, "[i]f the amount allowable as [a] credit[ ] under * * * [Section] 43 (relating to earned income credit), exceeds the tax imposed * * *, *the amount of such excess shall be considered an overpayment*" (Pet. App. A17, quoting I.R.C. § 6401(b) (emphasis added by court of appeals)). The court concluded that there was "nothing in the [statutory] language * * * or the legislative history of the earned income credit which would indicate that Congress intended that the * * * credit be treated differently than other funds that are classified as 'overpayments' and paid as a tax refund" (Pet. App. A21), and it accordingly held that such credits are within the scope of the intercept program. The court acknowledged that its holding conflicted with *Rucker* v. *United States*, No. 83-1804 (10th Cir., Dec. 28, 1984), and *Nelson* v. *Regan*, 731 F.2d 105 (2d Cir. 1984), cert. denied *sub nom. Manning* v. *Nelson*, No. 84-33 (Oct. 1, 1984), but expressed the view that those other circuits had "misinterpreted the statute" (Pet. App. A20).

ARGUMENT

1. The decision below correctly holds that amounts owed individuals as earned income credits are subject to the tax refund intercept program. As we explained in more detail in

our memorandum in *Manning* v. *Nelson* (84-33 Mem. at 2-7),[6] the governing statutory scheme makes plain that amounts (like earned income credits) that are deemed "overpayments" of tax are to be treated exactly the same way as actual overpayments of tax for purposes of the intercept program. Petitioner's position requires that the word "overpayment" be given one meaning in Section 6402(a) of the Code and a different meaning in Section 6402(c) — a mode of statutory construction that is to say the least disfavored. Contrary to petitioner's contention (Pet. 12-13), moreover, the important social policy underlying the earned income credit does not tip the scales in favor of her strained construction of the statute. The tax refund intercept program involves a social policy of comparable importance — Congress's determination to respond to the increasing failure of divorced and separated parents to honor their child-support commitments.

2. We do, however, agree with petitioner that the decision below squarely conflicts with the Second Circuit's decision in *Nelson, supra,* and with the Tenth Circuit's decision in *Rucker, supra.* In each of those cases, the court of appeals held that amounts owed individuals as earned income credits are "overpayments" only for purposes of Section 6402(a), and not for purposes of Section 6402(c), and hence that such amounts may not be intercepted to satisfy past-due support obligations. Although the Court denied certiorari in *Nelson,* No. 84-33 (Oct. 1, 1984), there existed no circuit conflict at that time.

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[6]We did not petition for certiorari in *Manning* because the earned income credit question was then one of first impression in the courts of appeals (84-33 Mem. at 3). Under Rule 19.6 of this Court's Rules, however, we were treated as respondents in this Court. We filed a memorandum expressing the view that the question was important and that the Second Circuit's decision was wrong, but we noted that the Court might deem it appropriate to await a circuit conflict before granting review (84-33 Mem. at 7-8). A copy of that memorandum is being furnished to counsel in the present case.

Resolution of the conflict which now exists is essential to administration of the tax refund intercept program. The issue affects many thousands of individuals. The IRS advises that it intercepted a total of 1,041,597 refunds for the calendar years 1982-1984. Of that total, the Service believes that 525,446 may have had an earned income credit component. The total dollar amount of earned income credits involved in these interceptions, the IRS estimates, is approximately $141,345,000. Fairness to taxpayers, not to mention considerations of administrative convenience, requires implementing this on-going program in a uniform manner nationwide. Accordingly, we do not oppose the granting of the petition for a writ of certiorari.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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MAY 1985

DOJ-1985-05

PETITIONER'S

BRIEF

(3)

No. 84-1686

In The
Supreme Court of the United States
October Term, 1984

MARIE D. SORENSON, on behalf of herself and all others similarly situated,

Petitioner,

v.

THE SECRETARY OF THE TREASURY OF THE UNITED STATES and THE UNITED STATES OF AMERICA

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE PETITIONER

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QUESTION PRESENTED

Does § 464(a) of the Social Security Act or § 6402(c) of the Internal Revenue Code authorize the Secretary of the Treasury to intercept earned income credit benefits owed to child-support debtors and their new families and give them to states collecting assigned child-support claims?

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TABLE OF AUTHORITIES

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported at 752 F.2d 1433, and is reproduced in the appendix to the petition at A-1. The opinion of the District Court for the Western District of Washington is reported at 557 F. Supp. 729, and is reproduced in the appendix to the petition at A-22.

JURISDICTION

Jurisdiction to review the decision of the Court of Appeals by writ of certiorari is conferred on this Court by 28 U.S.C. § 1254. The decision of the Court of Appeals was filed on February 5, 1985. The petition for writ of certiorari was filed on April 24, 1985. It was granted on June 17, 1985.

STATUTES

Social Security Act, § 464 (prior to its amendment in 1984):

> *Collection of past-due support from Federal tax refunds*
>
> (a) *Procedures applicable; distribution*
>
> Upon receiving notice from a State agency administering a plan approved under this part that a named individual owes past-due support which has been assigned to such State pursuant to section 402(a)(26) of this title, the Secretary of the Treasury shall

determine whether any amounts, as refunds of Federal taxes paid, are payable to such individual (regardless of whether such individual filed a tax return as a married or unmarried individual). If the Secretary of the Treasury finds that any such amount is payable, he shall withhold from such refunds an amount equal to the past-due support, and pay such amount to the State agency (together with notice of the individual's home address) for distribution in accordance with section 457(b)(3) of this title.

(b) *Regulations; contents, etc.*

The Secretary of the Treasury shall issue regulations, approved by the Secretary of Health and Human Services, prescribing the time or times at which States must submit notices of past-due support, the manner in which such notices must be submitted, and the necessary information that must be contained in or accompany the notices. The regulations shall specify the minimum amount of past-due support to which the offset procedure established by subsection (a) of this section may be applied, and the fee that a State must pay to reimburse the Secretary of the Treasury for the full cost of applying the offset procedure, and provide that the Secretary of the Treasury will advise the Secretary of Health and Human Services, not less frequently than annually, of the States which have furnished notices of past-due support under subsection (a) of this section, the number of cases in each State with respect to which such notices have been furnished, the amount of support sought to be collected under this subsection by each State, and the amount of such collections actually made in the case of each State.

(c) *Definition*

As used in this part the term "past-due support" means the amount of a delinquency, determined under a court order, or an order of an administrative process

established under State law, for support and maintenance of a child, or of a child and the parent with whom the child is living.

Social Security Act, § 464(a), as amended Aug. 16, 1984, Pub.L. No. 98-378, § 11(d), 98 Stat. 1318, and § 21(a) and (b), 98 Stat. 1322 and 1324:

(1) Upon receiving notice from a State agency administering a plan approved under this part that a named individual owes past-due support which has been assigned to such State pursuant to section 402(a)(26) or section 471(a)(17) of this title, the Secretary of the Treasury shall determine whether any amounts, as refunds of Federal taxes paid, are payable to such individual (regardless of whether such individual filed a tax return as a married or unmarried individual). If the Secretary of the Treasury finds that any such amount is payable, he shall withhold from such refunds an amount equal to the past-due support, shall concurrently send notice to such individual that the withholding has been made (including in or with such notice a notification to any other person who may have filed a joint return with such individual of the steps which such other person may take in order to secure his or her proper share of the refund), and shall pay such amount to the State agency (together with notice of the individual's home address) for distribution in accordance with section 457(b)(4) or (d)(3) of this title.

(2) (A) Upon receiving notice from a State agency administering a plan approved under this part that a named individual owes past-due support (as that term is defined for purposes of this paragraph under subsection (c) of this section) which such State has agreed to collect under section 454(6) of this title, and that the State agency has sent notice to such individual in accordance with paragraph (3)(A), the Secretary of the Treasury shall determine whether any amounts, as refunds of Fed-

eral taxes paid, are payable to such individual (regardless of whether such individual filed a tax return as a married or unmarried individual). If the Secretary of the Treasury finds that any such amount is payable, he shall withhold from such refunds an amount equal to such past-due support, and shall concurrently send notice to such individual that the withholding has been made, including in or with such notice a notification to any other person who may have filed a joint return with such individual of the steps which such other person may take in order to secure his or her proper share of the refund. The Secretary of the Treasury shall pay the amount withheld to the State agency, and the State shall pay to the Secretary of the Treasury any fee imposed by the Secretary of the Treasury to cover the costs of the withholding and any required notification. The State agency shall, subject to paragraph (3)(B), distribute such amount to or on behalf of the child to whom the support was owed.

(B) This paragraph shall apply only with respect to refunds payable under section 6402 of the Internal Revenue Code of 1954 after December 31, 1985, and before January 1, 1991.

(3)(A) Prior to notifying the Secretary of the Treasury under paragraph (1) or (2) that an individual owes past-due support, the State shall send notice to such individual that a withholding will be made from any refund otherwise payable to such individual. The notice shall also (i) instruct the individual owing the past-due support of the steps which may be taken to contest the State's determination that past-due support is owed or the amount of the past-due support, and (ii) provide information, as may be prescribed by the Secretary of Health and Human Services by regulation in consultation with the Secretary of the Treasury, with respect to procedures to be followed in the case of a joint return, to protect the share of the refund which may be payable to another person.

(B) If the Secretary of the Treasury determines that an amount should be withheld under paragraph (1) or (2), and that the refund from which it should be withheld is based upon a joint return, the Secretary of the Treasury shall notify the State that the withholding is being made from a refund based upon a joint return, and shall furnish to the State the names and addresses of each taxpayer filing such joint return. In the case of a withholding under paragraph (2), the State may delay distribution of the amount withheld until the State has been notified by the Secretary of the Treasury that the other person filing the joint return has received his or her proper share of the refund, but such delay may not exceed six months.

(C) If the other person filing the joint return with the named individual owing the past-due support takes appropriate action to secure his or her proper share of a refund from which a withholding was made under paragraph (1) or (2), the Secretary of the Treasury shall pay such share to such other person. The Secretary of the Treasury shall deduct the amount of such payment from amounts subsequently payable to the State agency to which the amount originally withheld from such refund was paid.

(D) In any case in which an amount was withheld under paragraph (1) or (2) and paid to a State, and the State subsequently determines that the amount certified as past-due support was in excess of the amount actually owed at the time the amount withheld is to be distributed to or on behalf of the child, the State shall pay the excess amount withheld to the named individual thought to have owed the past-due support (or, in the case of amounts withheld on the basis of a joint return, jointly to the parties filing such return).

Internal Revenue Code, § 6401(b) (prior to its amendment in 1984):

> *Excessive credits.*—If the amount allowable as credits under sections 31 (relating to tax withheld on wages) and 39 (relating to certain uses of gasoline, special fuels, and lubricating oil), and 43 (relating to earned income credit) exceeds the tax imposed by subtitle A (reduced by the credits allowable under subpart A of part IV of subchapter A of chapter 1, other than the credits allowable under sections 31, 39, and 43), the amount of such excess shall be considered an overpayment. For purposes of the preceding sentence, any credit allowed under paragraph (1) of section 32 (relating to withholding of tax on nonresident aliens and on foreign corporations) to a nonresident alien individual for a taxable year with respect to which an election under 6013(g) or (h) is in effect shall be treated as an amount allowable as a credit under section 31.

Internal Revenue Code, § 6401(b)(1), as amended July 18, 1984, Pub. L. No. 98-369, Title IV, § 474(r)(36), 98 Stat. 846:

> *In general.*—If the amount allowable as credits under subpart C of part IV of subchapter A of chapter 1 (relating to refundable credits) exceeds the tax imposed by subtitle A (reduced by the credits allowable under subparts A, B, and D of such part IV), the amount of such excess shall be considered an overpayment.

Internal Revenue Code, § 6402(c):

> *Offset of past-due support against overpayments.* — The amount of any overpayment to be refunded to the person making the overpayment shall be reduced by the amount of any past-due support (as defined in section 464(c) of the Social Security Act) owed by that person of which the Secretary has been notified by a State in accordance with section 464 of the Social Security Act. The Secretary shall remit the amount by which the overpayment is so reduced to the State to which such support has been assigned and notify the person making the overpayment that so much of the overpayment as was necessary to satisfy his obligation for past-due support has been paid to the State. This subsection shall be applied to an overpayment prior to its being credited to a person's future liability for an internal revenue tax.

The text of Internal Revenue Code, § 32 (formerly § 43) is set forth in the appendix to the petition at A-85.

STATEMENT OF THE CASE

When a child receives public assistance from a state under the Aid to Families with Dependent Children ("AFDC") program, the child's custodian must assign to the state any rights to collect child-support payments from an indebted noncustodial parent.[1] In 1981, Congress enacted legislation to assist states in collecting such assigned child-support payments.[2] The new law directed the Secretary of the Treasury to take certain tax refunds owed

1. 42 U.S.C. § 602(a)(26).

2. Omnibus Budget Reconciliation Act of 1981, Pub.L. No. 97-35, § 2331, 95 Stat. 860 ("OBRA"). The statutory provisions at issue in this case, § 464(a) of the Social Security Act, 42 U.S.C. § 664(a), and § 6402(c) of the Internal Revenue Code, 26 U.S.C. § 6402(c), originated in subsections 2331(a) and (c) of OBRA.

to indebted noncustodial parents and to pay them to the states entitled to reimbursement for AFDC payments. It is sometimes referred to as an "intercept" law because it involves the intereception of tax refunds.

Plaintiff Marie Sorenson did not owe child support to a state or to anyone else.[3] The intercept law affected her, however, because her husband owed support for a child of a previous marriage. The child, in the custody of Mr. Sorenson's former wife, had received public assistance from the state of Washington, and the right to collect support from Mr. Sorenson had been assigned by his former wife to the state. Because of a disability, Mr. Sorenson was unable to work; consequently, he was in arrears in his support payments to the state. The state notified the Secretary of Mr. Sorenson's indebtedness, triggering the operation of the intercept law.

In February of 1982, plaintiff and her husband filed a joint Federal income tax return for 1981. All income was from plaintiff's wages and her unemployment compensation benefits. The Sorensons were entitled to a refund. In addition, based on their low income and the presence in their

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3. The facts of plaintiff's case have not been disputed. The factual statements recited here, unless another source is given, are based on plaintiff's complaint (CR 2) which was verified by a separate declaration (CR 8). ("CR" refers to the clerk's record; corresponding numbers are the docket numbers assigned to documents by the clerk of the District Court.) The case was decided by the District Court on cross motions for summary judgment, and the court accepted plaintiff's uncontroverted factual allegations.

household of a dependent child, they were entitled to an earned income credit benefit.[4]

The Secretary initially asserted the authority under the intercept law to withhold all funds owed to either of the Sorensons, including those owed as an earned income credit benefit, up to the amount of Mr. Sorenson's outstanding obligation to the state. Plaintiff and her husband were notified accordingly that their refund and earned income credit benefit were being intercepted. In response, plaintiff brought the present action in the District Court for the Western District of Washington in April of 1982. She was permitted to maintain the action as representative of a class of non-debtor spouses affected by the intercept law.[5]

Three substantive issues were presented to the District Court; two of them are no longer in dispute. The first involved the right of a non-debtor spouse to her share

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4. The earned income credit benefit is a payment distributed through the tax refund process to families with dependent children living in the household and with earned income of less than $11,000 a year ($10,000 before 1984). The amount of the benefit is $550 ($500 before 1984) or less depending on the amount of earned income. *See* 26 U.S.C. § 32 (Pet. App. at A-85).

5. The District Court permitted plaintiff to represent a class defined as follows: "all residents of the State of Washington (1) who have filed joint Federal income tax returns for 1981; (2) whose spouses owe money to the State of Washington for child support; and (3) who were entitled to a refund of taxes withheld, not exclusively from their spouses' earnings, or to an earned income credit, all or part of which has been withheld by the Internal Revenue Service under the authority of 26 U.S.C. § 6402 or 42 U.S.C. § 664." 557 F. Supp. at 733 (Pet. App. A-40.)

of a joint refund.[6] The second involved the process constitutionally due to a non-debtor spouse.[7]

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6. Initially, the Secretary took the position that 100% of any refund owed to either spouse in a couple filing jointly could be intercepted. His standard-form notice that an interception had occurred made no reference to any rights of a non-debtor spouse. (CR 10, p. 3) Plaintiff initially took the position that a refund owed to a non-debtor spouse, representing funds that originated as earnings of that spouse, could not be intercepted. Under Washington law, the earnings of the non-debtor spouse are not subject to garnishment for child support owed by the debtor spouse. *Van Dyke* v. *Thompson*, 95 Wn.2d 726, 630 P.2d 420 (1981). Generally, in Washington, when claims of pre-marital creditors are presented, neither spouse is considered to have any interest in the earnings of the other. Wash. Rev. Code § 26.16.200. Plaintiff contended that state law defining property interests should limit what could be taken by the Secretary, see *Aquilino* v. *United States*, 363 U.S. 509 (1960), and *United States* v. *Overman*, 424 F.2d 1142 (9th Cir. 1970), and that state law precluded the taking of funds originating as earnings of the non-debtor spouse.

Before the District Court issued its decision, the Secretary changed his position twice. His first revised position was that he could intercept 100% of any overpayment resulting from the earnings of the debtor spouse and 50% of any overpayment resulting from the earnings of the non-debtor spouse. (CR 47, p. 2) His ultimate position was that only that portion of a joint refund owned by the debtor spouse could be intercepted, and that the non-debtor spouse was entitled to the remainder. (CR 54, p. 6) While he rejected plaintiff's theory of ownership based on *Van Dyke* v. *Thompson*, he applied the general principles of Washington community property law, treating community income, earned by either spouse, as owned in equal parts by each. See Wash. Rev. Code § 26.16.010 *et seq.*; *Poe* v. *Seaborn*, 282 U.S. 101 (1930). The District Court accepted the Secretary's second revised position holding that only 50% of a community refund could be intercepted, 557 F. Supp. at 734-36 (Pet. App. A-43 - A-54), and plaintiff did not seek appellate review of that holding.

In the Child Support Enforcement Amendments of 1984, Congress amended §464 of the Social Security Act to protect the rights of non-debtor spouses to the portion of any joint refund to which they are entitled. Pub.L. No. 98-378, § 21(a), Aug. 16, 1984, 98 Stat. 1322.

7. The District Court ruled that, under the Due Process Clause of the Fifth Amendment, the Secretary was obligated to notify non-debtor spouses of their right to receive their share of a refund. 557 F. Supp. 736-38 (Pet. App. A-54 - A-64). It subsequently ordered the Secretary to give such notice when he declined to do so voluntarily. (CR 62)

In the Child Support Enforcement Amendments of 1984, Congress required the establishment of notice and hearing procedures.

The third issue addressed by the District Court is the issue presented for decision by this Court. It relates to the interception of earned income credit benefits. Plaintiff contends that the intercept law does not authorize the taking of earned income credit benefits. The District Court ruled that it does. 557 F. Supp. at 733-34 (Pet. App. A-41 - A-43). Plaintiff appealed from that ruling.

The Secretary did not appeal from the District Court's resolution of the merits of any issue, but he appealed from the District Court's judgment on jurisdictional grounds.

The Court of Appeals affirmed on all issues. 752 F.2d 1433 (Pet. App. A-1). It held that there was Federal question jurisdiction under 28 U.S.C. § 1331 over the class claims for injunctive and declaratory relief, and that sovereign immunity with respect to those claims was waived under 5 U.S.C. § 702. It held that there was jurisdiction over plaintiff's individual refund claim under 28 U.S.C. §1346(a)(1). On the merits, it held that the intercept law applied to earned income credit benefits. This holding was in direct conflict with decisions of courts of appeals in the two cases that had previously addressed the issue, *Nelson* v. *Regan*, 731 F.2d 105 (2d Cir.),

cert. denied, 105 S. Ct. 175 (1984), and *Rucker v. Secretary of the Treasury*, 751 F.2d 351 (10th Cir. 1984).[8]

SUMMARY OF THE ARGUMENT

This case involves a potential conflict between two programs established by Federal statute, the earned income credit benefit program and the intercept program. The provisions of the intercept law were correctly construed by the Second Circuit in *Nelson* and the Tenth Circuit in *Rucker* to promote the purposes of both programs and to avoid the conflict.

The language of the intercept provisions does not authorize the interception of earned income credit benefits. Section 464(a) of the Social Security Act, 42 U.S.C. § 664 (a), only authorizes interception of "refunds of Federal *taxes paid*." (Emphasis added.)

Although it is "distributed through the tax refund process," *Rucker, supra* at 356 (Pet. App. A-70), the earned income credit benefit "is not a tax refund . . . ." *Ibid.* Entitlement is not contingent on owing or having paid any Federal tax. If one has not paid any Federal tax, one cannot receive a refund of Federal *taxes paid*.

Section 464(a) of the Social Security Act and §6402(c) of the Internal Revenue Code, 26 U.S.C. § 6402(c), were adopted together and should be construed consistently with each other. Section 6402(c) is no broader than § 464(a). While § 464(a) authorizes the interception of "refunds of Federal taxes paid," § 6402(c) authorizes the interception

8. The Secretary did not seek review in this Court in *Rucker*.

of "overpayments," with the qualification "in accordance with section 464 of the Social Security Act." Earned income credit benefits are considered overpayments for the procedural purpose of designating a mechanism for their distribution. Section 6402(c) does not authorize their interception.

The earned income credit benefit program was established in 1975 to provide direct financial assistance to working-poor families with children and to induce parents in such families to work rather than to seek public assistance. The children in families eligible for the benefit may be as needy as, or more needy than, children supported by AFDC.

The intercept program was established in 1981 to help reduce the cost of the AFDC program by collecting support claims assigned to states. This purpose is served by the interception of refunds of Federal taxes paid, as expressly authorized by Congress. An expansive construction of the intercept law—one that would allow interception of earned income credit benefits as well as refunds of Federal taxes paid—would frustrate the purposes of the earned income credit benefit program. When it established the intercept program, Congress did not intend such a result.

ARGUMENT

1. The language of the intercept provisions does not authorize the taking of earned income credit benefits

A. Social Security Act, § 464(a)

The primary statutory text at issue in this case is § 464(a) of the Social Security Act, 42 U.S.C. § 664 (a). In § 464(a), Congress established a new procedure for obtaining reimbursement for states that have supported children with public assistance through the Aid to Families with Dependent Children program and that have been assigned the right to collect support payments from the indebted noncustodial parents. Congress authorized the Secretary of the Treasury to intercept tax refunds owed to such parents, and to give the refunds to the states that paid the public assistance.[9]

Specifically, § 464(a) authorizes the Secretary to intercept "any amounts, as refunds of Federal taxes paid, [that] are payable" to indebted parents. The question before this Court is whether earned income credit benefits are "refunds of Federal taxes paid" for purposes of the intercept program. If they are, then interception of earned income credit benefits is authorized by § 464 (a); if they are not, then interception is not authorized.

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9. In the Child Support Enforcement Amendments of 1984, Congress amended § 464(a) of the Social Security Act to make the intercept program available for collection of child support owed to private individuals not receiving AFDC, provided that their support claims are assigned, for collection purposes, to a state. Pub.L. No. 98-378, § 21(a), Aug. 16, 1984, 98 Stat. 1322. This change is applicable to refunds payable after December 31, 1985.

There is no express reference to earned income credit benefits in § 464(a) or in any other provision of the intercept law.

An earned income credit benefit is not a refund of Federal taxes paid. "It is a payment made to low income [families] to help them meet the basic costs of life." *In re Searles*, 445 F. Supp. 749, 755 (D. Conn. 1978). It is distributed through the tax refund *process* to families with a dependent child or children living in the household and with earned income of less than $11,000 a year. The amount of the annual benefit is $550 or less depending on the amount of earned income. *See* 26 U.S.C. § 32 (Pet. App. A-85).

The earned income credit is unlike ordinary tax credits in an important respect. Ordinary tax credits function only to reduce tax liability. The reduction may result in a reduction of taxes otherwise owed or in a refund of taxes previously paid; but if no taxes were owed or previously paid, the holder of the credit will not be entitled to any payment from the Secretary. A person entitled to a credit for political contributions under 26 U.S.C. § 24, for example, but who has no tax liability, cannot take advantage of the credit.

The earned income credit, by contrast, entitles the beneficiary to a cash payment even in the absence of any tax liability or previous payment of withholding or estimated taxes.[10] "While [earned income] credit benefits

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10. For example, in 1981, a family whose only income was earned income of $3,000 would have had no Federal Tax liability. The family would nevertheless have been eligible for an earned income credit benefit payment of $298, even if no funds had been withheld for Federal taxes and no estimated taxes had been paid.

are distributed through the tax refund process, a recipient need not have owed or paid any taxes to be eligible." *Rucker, supra* at 356 (Pet. App. A-70).

If one has not owed or paid any Federal tax, one cannot receive a refund of Federal *taxes paid*. Because earned income credit benefits are not refunds of Federal taxes paid, their interception is not authorized by § 464(a).

The Ninth Circuit construed § 464(a) expansively to apply to earned income credit benefits by reordering the text of § 464(a). The critical language in the statutory text reads as follows:

> the Secretary of the Treasury shall determine whether any amounts, as refunds of Federal taxes paid, are payable to such individual . . . [and] shall withhold from such refunds an amount equal to the past-due support, and pay such amount to the State agency . . . .

The "individual" referred to is previously identified as one who "owes past-due support which has been assigned to [a] State . . . ."

The Ninth Circuit treated the quoted language as if the word "payable" preceded the words "as refunds," and as if the words "of Federal taxes paid" were omitted. It read the provision as applicable not only to refunds of Federal taxes paid but also to anything payable as refunds, or in other words, to anything payable by "the

mechanism used for the refund of Federal taxes paid . . . ." [11] 752 F.2d at 1441 (Pet. App. A-16).

In the language actually adopted by Congress, the word "payable" does not precede "as refunds"; it precedes "to such individual." The function of the phrase "payable to such individual" is not to expand the scope of the intercept authorization, but rather to explain *whose* refund of Federal taxes may be intercepted.

The Second and Tenth Circuits were correct in concluding that earned income credit benefits are not refunds of Federal taxes paid. Section 464(a) only authorizes the interception of refunds of Federal taxes paid. Consequently, it does not authorize the interception of earned income credit benefits.

B. Internal Revenue Code, § 6402(c)

Section 464(a) of the Social Security Act originated in § 2331(a) of the Omnibus Budget Reconciliation Act of 1981. In subsection (a) of § 2331, Congress created the intercept program. In subsection (c), it implemented the program by amending § 6402(c) of the Internal Revenue Code, 26 U.S.C. § 6402(c). As the courts in both *Nelson* and *Rucker* noted, these two provisions were adopted together and should be construed consistently with each other.

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11. The court articulated its argument as follows: "[Section 6402(c)] provides that 'any' amounts payable 'as' refunds of federal taxes paid may be retained and transferred. This language does include the earned income credit because it is payable 'as a refund of Federal taxes paid.'" 752 F.2d at 1441 (emphasis in original) (Pet. App. A-16).

The opening sentence of § 6402(c) itself "expressly relates back to section 464 of the Social Security Act . . . ." *Nelson, supra* at 111 (Pet. App. A-80).

> *The amount of any overpayment to be refunded to the person making the overpayment shall be reduced* by the amount of any past-due support . . . owed by that person of which the Secretary has been notified by a State *in accordance with section 464 of the Social Security Act.*

(Emphasis added.)

The words "in accordance with section 464 of the Social Security Act" at the end of the quotation do not modify "has been notified by a State" as one might initially assume. Rather they belatedly modify the words "shall be reduced" in italics at the beginning of the quotation. This conclusion follows from the fact that, when Congress adopted § 6402(c), § 464 of the Social Security Act (adopted at the same time) did not impose requirements on states; it only imposed requirements on the Secretary. It was the Secretary who acted *in accordance with* § 464; there was nothing in the section with which states could act in accordance.[12]

Since the interceptions mandated by § 6402(c) of the Internal Revenue Code are to be made in accordance with

12. States, when they notified the Secretary of child-support debts, acted *in accordance with* § 454 of the Social Security Act, 42 U.S.C. § 654, which required them to participate in the intercept program, and with regulations adopted by the Secretary. Section 454 required that "[a] State plan for child and spousal support . . . provide that the State has in effect procedures necessary to obtain payment of past-due support from overpayments made to the Secretary of the Treasury as set forth in section 464 of this title, and take all steps necessary to implement and utilize such procedures . . . ." Section 464(b) required *the Secretary* to adopt regulations regarding notice.

§ 464 of the Social Security Act, and since only "refunds of Federal taxes paid" may be intercepted under § 464, only overpayments representing Federal taxes paid in excess of tax liability may be intercepted under § 6402 (c). Earned income credit benefits are not such overpayments.

The Secretary's argument for an expansive interpretation of § 6402(c) emphasizes the definition in § 6401 of the word "overpayment." Under the heading "Amounts treated as overpayments," § 6401 provides that the amount by which certain tax credits, including an earned income credit, exceed tax liability is "considered an overpayment . . . ." Given this definition, the Secretary contends, § 6402(c) should be read to authorize the interception of earned income credit benefits.[13]

Such an interpretation would create a conflict between § 464(a) of the Social Security Act, which only permits the interception of "refunds of Federal taxes paid," and § 6402 of the Internal Revenue Code, which permits the interception of "overpayments." The conflict is easily avoided since there is nothing in the language of § 6402(c) to require the interception of all funds that are, for any purpose, considered overpayments.

13. Since the question presented here involves child-support collection, something outside of the Secretary's area of special expertise, his interpretation is not entitled to special deference. "Courts are the final authority on questions of statutory construction, . . . particularly where, as here, the construction requires consideration of broad concerns beyond the agency's expertise." *Grunfeder v. Heckler*, 748 F.2d 503, 505 (9th Cir. 1984) (en banc).

The courts in both *Rucker* and *Nelson* noted that § 6401, allowing credits to be considered overpayments, is a general provision adopted before, and independently of, the intercept law. It was amended in 1975, at the time of the creation of the earned income credit benefit program, to allow the new benefits to be considered overpayments. By treating earned income credits like overpayments, Congress simply chose a *procedure* for paying earned income credit benefits.

Congress implemented the earned income credit benefit program through the mechanism of the tax refund process by treating the benefits for procedural purposes like something they were not, namely, overpayments. It does not follow that, for the entirely unrelated purposes of the intercept program, Congress intended to include earned income credit benefits when it referred to overpayments in § 6402(c). These provisions "should be construed, not as theorems of Euclid, but with some imagination of the purposes which lie behind them." *Lehigh Valley Coal Co. v. Yensavage*, 218 F. 547, 553 (2nd Cir. 1914) (Hand, J.).

The Second and Tenth Circuits were correct in construing Section 6402(c) of the Internal Revenue Code consistently with § 464(a) of the Social Security Act to apply to overpayments representing Federal taxes paid in excess of tax liability. Neither section authorizes the interception of earned income credit benefits.

2. Congress did not intend, and would not have sanctioned, the taking of earned income credit benefits

The statutory language examined above does not justify the Secretary's assertion of authority to intercept earned

income credit benefits. Furthermore, implementation of the intercept provisions, as interpreted by the Secretary, would frustrate the purposes of the recently and deliberately established earned income credit benefit program. There is nothing in the legislative history of the Omnibus Budget Reconciliation Act of 1981 to suggest that Congress intended such a result.

A. History and purpose of the earned income credit benefit program

The earned income credit benefit program originated in the Tax Reduction Act of 1975, Pub.L. No. 94-12, Title II, § 204(a), 89 Stat. 30. "Though it is given effect through the income tax laws, the earned income credit is in substance an item of social welfare legislation, intended to provide low-income families with 'the very means by which to live' . . . ." *In re Searles, supra* at 753 (citation omitted). By establishing the program, Congress sought to "*provide relief to families* who currently pay little or no income tax [and who had] been hurt the most by rising food and energy costs." S. Rep. No. 94-36 (Finance Comm.), 94th Cong., 1st Sess. 12, *reprinted in* 1975 U.S. Code Cong. & Ad. News, 54, 64 (emphasis added). It also sought to provide an "incentive for low-income people to work . . . [and to] induc[e] individuals with families receiving Federal assistance to support themselves." *Ibid.* Both of these objectives—providing aid to poor families and providing an incentive to work rather than to seek public assistance—would be frustrated by allowing the interception of earned income credit benefits.

A child in a working-poor family eligible for an earned income credit benefit may be just as needy as, or more

needy than, a child in a family receiving AFDC.[14] Interception of an earned income credit benefit destined for the family of such a child means that the relief intended by Congress simply will not arrive. The children in such families will be innocent victims of the intercept law if the Secretary's interpretation is adopted by this Court.

Similarly the earned income credit benefit program's incentive for choosing work over AFDC would be frustrated by the interception of benefits. AFDC benefits are not subject to interception or garnishment by the state seeking reimbursement for assistance previously furnished.[15] Interception of earned income credit benefits

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14. A family of four receiving AFDC benefits in Seattle in 1981 had a monthly grant of $515 ($6,180 a year). Washington Administrative Code 388-29-100, as amended by Order 1550, filed 10/2/80. By comparison, a family receiving the maximum earned income credit benefit in that year, $500, and whose only income was the corresponding earned income of $5,000, would have had to subsist on less. To make matters worse, the latter family would in all likelihood have had work-related expenses not experienced by the former and would have paid Social Security taxes. If the earned income credit benefit intended for that family were intercepted, it is reasonable to suppose that the loss would be reflected in the family's most significant non-fixed expense, its food budget.

15. Wash. Rev. Code § 74.04.280 provides as follows: "none of the moneys received by recipients under this title [Public Assistance] shall be subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law." Wash. Rev. Code § 74.20A.030 provides as follows: "No collection [of child support] shall be made from a parent . . . who is the recipient of public assistance moneys while such person . . . [is] in such status." Wash. Rev. Code § 74.20A.055(10) provides that a "responsible parent" is "presumed to have no ability to pay child support . . . from any income received from aid to families with dependent children . . . ." Similar provisions in other states recognize the policy of protecting welfare benefits for their intended benficiaries.

While the exemption statutes are enacted by states (which administer the AFDC programs) rather than by Congress, their provisions are reported to the Department of Health and Human Services as part of each state's plan for child and spousal support. *See* 42 U.S.C. §§ 654, 667. "The State plan [must] provide a copy of State statutes . . . that provide procedures to be used . . . to enforce . . . child support obligations." 45 C.F.R. § 302.17. Congress, with its interest in reducing the cost of the AFDC program, could have established a Federal policy of not exempting welfare benefits and preempted state exemption statutes, but it has not done so. There is no reason to presume a Congressional intent at the time of OBRA to treat earned income credit benefits differently from other welfare benefits paid to poor families with children. On the contrary, it is reasonable to presume that Congress would have intended to treat similar programs in a like manner.

would add to the already existing work disincentives that deter many conscientious parents, who would prefer to be self-supporting, from working. *See* United States Commission on Civil Rights, *A Growing Crisis: Disadvantaged Women and Their Children* (May 1983).

There is no reason to strain the language of OBRA to arrive at a construction that would produce such harsh results and frustrate the purposes of the earned income credit benefit program. "If it were clear from the language of the Act and its legislative history that Congress intended to authorize this result, this Court would be compelled to enforce it. . . . But where the statutory language and legislative history, as in this case, need not be construed to reach such a result, . . . [this Court should] adopt a permissible construction that accords with . . . common sense and the public weal." *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 196 (1978) (Powell, J., dissenting).

B. History and purpose of the intercept program

The intercept program originated in the Omnibus Budget Reconciliation Act of 1981. OBRA was a massive piece of legislation. It occupies 576 pages in the United States Statutes at Large. There was controversy in the summer of 1981 over whether what was generally referred to as the Administration's "budget cuts" should be considered by Congress item by item or as a package. The proponents of the latter approach prevailed.[16] Consequently OBRA, which included many substantive provisions such as those establishing the intercept program, was adopted by Congress without close consideration of each program it involved.[17]

The provisions at issue here were far from the focus of Congressional attention. To date, no party to this litigation, and no court that has written on the subject, has been able to cite any mention of the earned income credit benefit in connection with the consideration or adoption of OBRA's intercept provisions. It is reasonable to assume that members of Congress never actually considered whether earned income credit benefits should be subject

16. See N.Y. Times, June 26, 1981, at 1 col. 6.

17. It was approved by the House of Representatives "before most of the House had even a skimming acquaintance with what it was voting on. The bill that reached the Hill . . . was a 1½-inch stack of unnumbered and pencil-tracked pages, thrown together so hastily that the name and phone number of a woman budget analyst survived forgotten in the fine print." *Newsweek*, July 6, 1981, p. 20.

to interception when they authorized the interception of refunds of Federal taxes paid by adopting OBRA. *See* S. Rep. No. 37-139 (Budget Comm.), June 17, 1981, 97th Cong. 1st Sess. 1, 520-22, *reprinted in* 1981 U.S. Code Cong. & Ad. News 396, 787-88; H. Conf. Rep. No. 97-208, July 29, 1981, 97th Cong. 1st Sess. 653, 985, *reprinted in* 1981 U.S. Code Cong. & Ad. News 1010, 1347.

In March of 1984, the Second Circuit decided *Nelson v. Regan,* holding that earned income credit benefits were not subject to interception, and that the process afforded in connection with the intercept program was constitutionally inadequate. In August of 1984, Congress adopted the Child Support Enforcement Amendments of 1984. It addressed some of the constitutional concerns raised in *Nelson,* mandating certain notice and hearing rights. Pub. L. No. 98-378, § 21(a), Aug. 16, 1984, 98 Stat. 1322. As of August 1984, *Nelson* was the only appellate decision construing the intercept law. Congress had an opportunity to reject the Second Circuit's construction, but did not do so.

Under these circumstances, and in the absence of any plain expression of intent in OBRA, it would be inappropriate to ascribe to Congress an expansive intent to frustrate the purposes of the recently and deliberately created earned income credit benefit program, or to conclude that Congress would have sanctioned such a result had it anticipated the question.

The purposes of the intercept program, to reimburse states for AFDC payments and thereby to reduce the cost to both the states and the Federal Government of the AFDC program, and (after the 1984 Amendments) to col-

lect child support for private parties, are important. They can be promoted by intercepting refunds of Federal taxes paid, as Congress expressly directed, without compromising the purposes of the earned income credit benefit program.

The Secretary, on page 6 of his brief in response to the petition in this case, urges that the "intercept program involves a social policy of comparable importance [to that promoted by the earned income credit benefit program]—Congress's determination to respond to the increasing failure of divorced and separated parents to honor their child-support obligations." By speaking of "failure to honor obligations" the Secretary tacitly invites the Court to conclude that earned income credit beneficiaries whose benefits would be subject to interception are culpable and deserve to have their benefits taken. He implies that Congress would have embraced such a conclusion when it established the intercept program. This implication is unwarranted for at least three reasons.

First, it goes without saying that the needy children in working-poor families who benefit directly from the earned income credit program are not culpable. These children may be as needy as, or more needy than, children supported by the AFDC program. *See* n. 14 above. Collection of support from their families' earned income credit benefits may harm them as much as, or more than, support collections from AFDC benefits would harm children in AFDC families. The policy that precludes support collection from other children's welfare benefits applies with equal force to theirs.

Second, members of the plaintiff class and others like them—new spouses of individuals who owe child support—are not culpable. These new spouses (mostly new wives) are not responsible for the claims collected through the intercept program.[18] In seeking to secure the earned income credit benefits to which they are entitled, they are merely seeking to provide for the needy children who are currently and directly dependent on them, and for whom they *are* responsible.[19]

Finally, it would be a mistake to conclude without considering the facts of individual cases that each indebted spouse who is the target of the intercept program is willfully failing to honor a support obligation. Plaintiff's husband, for example, was unable to work because of a disability. (CR 2, p. 5) The husband of class member Lorna Kyllonen was making regular payments against his

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18. See n. 6 above. Because most noncustodial parents are men, most non-debtor spouses are women. The declarations of eleven non-debtor spouses, all women, were filed by plaintiff in the District Court. (CR 10, 11, 13, 16, 17, 18, 19, 21, 23, 24, 25)

19. Since Washington is a community property state, members of the plaintiff class are able to obtain 50% of the earned income credit benefit to which their families are entitled, even under the Secretary's interpretation of the intercept law. See n. 6 above. In common law states, the part, if any, of an earned income credit benefit available to its intended beneficiaries under the Secretary's interpretation of the intercept law would, presumably, depend on the distribution of earnings between spouses.

support debt to the state pursuant to an agreement based on his ability to pay. Although he was current in his payments under the agreement, his funds were intercepted.[20] (CR 13) The husband of class member Donna Baker was a construction worker who was unemployed for an extended period of time in 1981, a period of high unemployment in the construction industry in Washington state. (CR 23) These were not comfortably situated parents simply refusing to make child-support payments.[21]

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20. This example illustrates a problem in the procedures for assessment and collection of child support. When a parent with an ongoing child-support obligation has a reduction in income that is beyond his or her control, due for example to an injury or a layoff, the parent may be entitled to a modification of the support obligation under state law. However, for the same reason that the parent is unable to make the support payments, lack of funds, he or she is likely to be unable to afford the legal fees associated with obtaining a modification of a divorce decree or other court order establishing support. Consequently, a large support arrearage is likely to accrue. And support orders cannot, at least in Washington, be modified retroactively. Wash. Rev. Code § 26.09.170.

A state welfare agency to which a support claim has been assigned may accommodate a noncustodial parent's decreased ability to pay by agreeing to accept payments smaller than those ordered by a court. But the difference between what the agency accepts and what is owed will accrue as a debt subject, among other things, to collection through the intercept process.

21. When an indebted parent *is* able to pay support and fails to do so, the state has strong remedies available to it. Private parties of limited means are often unable to invoke available collection remedies because they cannot afford counsel; the state is under no such disability. In addition to such remedies as are available to private parties, including garnishment and contempt, the state may apply criminal sanctions to parents who fail to provide support. In a criminal action for nonsupport in the state of Washington, the defendant must show inability to pay, or another lawful excuse, once the state has shown failure to provide support. *State v. Russell*, 73 Wn. 2d 903, 912, 442 P.2d 988 (1968).

Had Congress considered authorizing the interception of earned income credit benefits when it adopted OBRA, it would have been faced with some basic policy questions: should the benefit that was destined to aid one needy child, in a family with income so low as to result in eligibility for an earned income credit benefit, be subject to interception to reimburse a state for assistance previously provided to another needy child?[22] Should an exception to the general policy that child support is not to be collected from welfare payments be made for earned income credit benefits?

Congress could have chosen to answer these questions in the affirmative and to extend the intercept program to earned income credit benefits. Had Congress considered the questions and made such a decision, its decision, wise or not, would be controlling. Since it neither considered the questions nor made such a decision, this Court should construe the intercept law in the way that promotes its purposes without frustrating those of the earned income credit benefit program.

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22. In assessing the competing interests involved in this case, and their bearing on the meaning to be ascribed to the language chosen by Congress in 1981, it is important to notice that the intercept program was not originally created as a mechanism for providing direct support for needy children; it was created to reduce the cost of the AFDC program. It was not available for the collection of support owed directly to custodial parents with needy children; it was only available to collect government revenue.

CONCLUSION

This Court should hold that the Secretary of the Treasury is not authorized to intercept earned income credit benefits. That portion of the judgment below which held to the contrary should be reversed.

Respectfully submitted,

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RESPONDENT'S

BRIEF

No. 84-1686

In the Supreme Court of the United States

OCTOBER TERM, 1985

MARIE D. SORENSON, ETC., PETITIONER

v.

SECRETARY OF THE TREASURY OF THE UNITED STATES AND THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS

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QUESTION PRESENTED

Whether an amount due to be refunded to an individual because of an earned income credit may be intercepted by the IRS and applied toward the individual's past-due child support obligations.

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In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 84-1686

MARIE D. SORENSON, ETC., PETITIONER

v.

SECRETARY OF THE TREASURY OF THE UNITED STATES AND THE UNITED STATES OF AMERICA

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A21) is reported at 752 F.2d 1433. The opinion of the district court (Pet. App. A25-A67) is reported at 557 F. Supp. 729. The order of the district court (Pet. App. A22-A24) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 5, 1985. The petition for a writ of certiorari was filed on April 24, 1985, and was granted on June 17, 1985. The jurisdiction of this Court lies under 28 U.S.C. 1254(1).

STATUTES INVOLVED

The relevant portions of Sections 43, 6305, 6401, and 6402 of the Internal Revenue Code of 1954 (26 U.S.C. (1976 ed. & Supp. V 1981)), and of Sections 452 and 464 of the Social Security Act, 42 U.S.C. (1976 ed. & Supp. V 1981) 652 and 664, as in effect during 1981, are set out in a statutory appendix (App., *infra*, 1a-9a). Unless otherwise noted, all statutory references are to the 1981 versions of the statutes. The term "I.R.C." will be used to refer to the version of the Internal Revenue Code currently in effect.

STATEMENT

1. Congress established the Aid to Families With Dependent Children (AFDC) program in 1935. Social Security Act, ch. 531, Tit. IV, §§ 401-406, 49 Stat. 627-629. "The category singled out for welfare assistance by AFDC is the 'dependent child.'" *King* v. *Smith*, 392 U.S. 309, 313 (1968). A "dependent child" is a needy child who has been deprived of parental care and support by the death, incapacity or "continued absence from the home" of a parent (42 U.S.C. 606(a)). The purposes of the program are to strengthen family life, to facilitate the care of dependent children in their own homes or in the homes of their relatives, and to help such parents or relatives attain the highest degree of self-sufficiency "consistent with the maintenance of continuing parental care and protection" (42 U.S.C. 601).

As a condition of eligibility under the AFDC program, an applicant for financial assistance must assign to the state any rights to support that he or she may possess (42 U.S.C. 602(a)(26)). Typically, the applicant for assistance will be the child's mother, and her rights to support will run against the child's

father, to whom she may or may not have been married. See S. Rep. 93-1356, 93d Cong., 2d Sess. 42 (1974). If the noncustodial parent becomes delinquent in his child-support payments, therefore, he becomes indebted to the state that has furnished AFDC assistance to his dependents.

In 1981, Congress enacted legislation to assist states in collecting delinquent child-support payments thus assigned to them. By concurrent amendments to the Social Security Act and the Internal Revenue Code, Congress directed the Secretary of the Treasury to "intercept" tax refunds owed to delinquent noncustodial parents and remit those sums to the states. Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, § 2331, 95 Stat. 860 (codified at 26 U.S.C. 6402 and 42 U.S.C. 664). In this manner, the states are reimbursed, at least in part, for the cost of furnishing support that the delinquent parent neglected to provide.

2. Petitioner is a married woman who lives in the State of Washington. Her husband was previously married, and his child by that marriage is a "dependent child" in the custody of his former wife (Pet. App. A4, A26). When petitioner's husband fell behind in his child-support payments, he became indebted to the State of Washington, which had provided financial assistance to his ex-wife and child under the AFDC program (*ibid.*).

In February 1982, petitioner and her husband filed a joint federal income tax return for 1981 (Pet. App. A4). Although the income reported on the return came exclusively from petitioner's wages (*ibid.*), she and her husband elected to file a joint return in order to benefit from the lower tax rates applicable thereto. See 26 U.S.C. 1(a) and (d). On the return, petitioner and her husband claimed a refund of $1,408,

consisting of excess tax withheld from her wages and an "earned income credit" (Pet. App. A4; see 26 U.S.C. 43). They did not receive the expected refund. The IRS withheld payment so that the refund could be remitted to the State of Washington to offset the amount petitioner's husband owed that State in consequence of his failure to pay child support (Pet. App. A4).

On April 14, 1982, petitioner's counsel mailed a letter to the IRS reiterating her request that the $1,408 be released (Pet. App. A11, A27). The IRS ultimately notified her that her claim for refund had been allowed to the extent of her one-half interest in the joint refund under Washington community property law. The IRS advised her, however, that the other half of the refund, representing her husband's community share, had been retained for payment to the State (*id.* at A5, A11-A12, A57-A58).

After receiving informal notification that her refund claim had been partially denied, petitioner brought this action in the United States District Court for the Western District of Washington (Pet. App. A4, A12-A13). She contended, inter alia, that a refund attributable to an earned income credit is not an "overpayment" of tax and hence may not be intercepted and used to pay past-due child support (Pet. App. A41-A43; see 26 U.S.C. 6402(c)). On behalf of herself and her husband, she requested that the intercepted half of the earned income credit be released (Pet. App. A10-A13, A41-A43). She also sought certification of the suit as a class action and requested, on behalf of herself and the class, injunctive relief and a declaration that earned income credits are outside the purview of the tax refund intercept program (*id.* at A13-A14). More broadly, petitioner challenged the interception of the tax refund on various state law and procedural due process grounds (*id.* at A44-A45, A54-A55).

The district court rebuffed several jurisdictional contentions interposed by the government (Pet. App. A33-A39)[1] and certified the case as a class action (*id.* at A41).[2] Turning to the merits, which were presented on cross motions for summary judgment (*id.* at A66), the court rejected petitioner's state law arguments, concluding that the IRS could reach her husband's one-half interest in the joint refund under Washington community property law (*id.* at A43-A54).[3] The district court likewise ruled for the government on the earned income credit issue, holding that, under the plain terms of the relevant statutes,

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[1] These contentions were based chiefly on the Anti-Injunction Act, the tax exception to the Declaratory Judgment Act, procedural limitations on refund suits, and sovereign immunity (Pet. App. A33-A39). To the extent the government renewed these arguments on appeal, the Ninth Circuit likewise rejected them (*id.* at A6-A13), and we have not sought review of those questions here.

[2] The class consists of all residents of the State of Washington who are situated similarly to petitioner and who filed joint federal income tax returns for 1981 (Pet. App. A40). Although the government unsuccessfully opposed class certification in the courts below (*id.* at A13-A14, A39-A41), we have not sought review of that question here.

[3] Petitioner had contended that no portion of the refund—*i.e.*, neither the part attributable to the earned income credit nor the part attributable to excess withholding from her wages—was subject to interception, pointing out that the refund stemmed exclusively from her earnings and contending that it could not be garnished to satisfy her husband's separate, pre-marital debts under Washington community property law (Pet. App. A43-A44). The district court rejected this argument (*id.* at A44-A54) and petitioner did not renew her state law contention on appeal (see *id.* at A5-A6). No state law issues are presented here. See Pet. Br. 9-10 & n.6.

earned income credits are deemed to be "overpayments" and hence are subject to interception in the same manner as actual overpayments of tax (*id.* at A41-A43, citing 26 U.S.C. 6401(b) and 6402(c)). And while rejecting the bulk of petitioner's due process claims (Pet. App. A63-A66), the district court noted that the IRS may properly intercept only that portion of the overall refund (including any earned income credit) that belongs to the spouse whose child-support payments are in arrears (*id.* at A58). The court agreed with petitioner that nonobligated spouses might be unable to protect their rights absent notice of this fact, and ordered the IRS to provide "adequate notice" to all class members (*id.* at A61-A63, A67).[4]

3. The court of appeals affirmed the district court in all respects (Pet. App. A1-A21). Petitioner's sole contention on appeal was that earned income credits are outside the scope of the tax refund intercept program (*id.* at A5-A6). She argued that an earned income credit is neither a "refund[] of Federal taxes paid" (42 U.S.C. 664(a)) nor an "overpayment to be refunded" (26 U.S.C. 6402(c)), but rather is in the nature of a grant of funds through the refund mechanism of the Internal Revenue Code (Pet. App. A16). She emphasized that persons with no federal

[4] Congress subsequently amended the Social Security Act explicitly to require, in the case of refunds payable after December 31, 1985, the giving of notice substantially similar to that ordered by the district court. Child Support Enforcement Amendments of 1984, Pub. L. No. 98-378, § 21, 98 Stat. 1322-1326 (amending 42 U.S.C. 664). The government did not appeal the notice issue in this case, and the IRS has generally implemented, in advance of Congress's enactment, comparable notice procedures on a nationwide basis. No due process question is raised here. See Pet. Br. 9-10.

tax liability are eligible to receive earned income credits.

The court of appeals unanimously rejected petitioner's argument (Pet. App. A14-A21). It pointed out that the Social Security Act permits interception, not merely of "tax refunds," but of "any amounts, *as refunds* of Federal taxes paid, [which] are payable" to a person delinquent in child support (*id.* at A15-A16, quoting 42 U.S.C. 664(a) (emphasis added by court of appeals)). And it pointed out that the parallel provisions of the Internal Revenue Code authorize interception of "any overpayment," with "overpayment" being defined to include the amount of any excess earned income credit due to be refunded to an individual (Pet. App. A16-A20, quoting 26 U.S.C. 6401(b) and 6402(c)). The court concluded that there was "nothing in the [statutory] language * * * or the legislative history of the earned income credit which would indicate that Congress intended that the * * * credit be treated differently than other funds that are classified as 'overpayments' and paid as a tax refund" (Pet. App. A21). It accordingly held that earned income credits are within the scope of the tax refund intercept program. The court acknowledged that its holding conflicted with *Rucker* v. *Secretary of the Treasury*, 751 F.2d 351 (10th Cir. 1984), and *Nelson* v. *Regan*, 731 F.2d 105 (2d Cir. 1984), cert. denied, No. 84-33 (Oct. 1, 1984), but expressed the view that those circuits had "misinterpreted the statute" (Pet. App. A20).

SUMMARY OF ARGUMENT

Congress enacted the tax refund intercept program in 1981 as an equitable and low-cost alternative to other, more traditional, methods of collecting child-support debts. The language of the statutes, the overall statutory scheme, and considerations of legislative policy make it clear that refunds attributable to earned income credits, like all other species of tax refunds, are covered by this program.

1. The earned income credit is a "refundable credit." The provisions that empower the IRS to make refunds of earned income credits are Sections 6401 and 6402 of the Code. Section 6402(a) authorizes the Commissioner to refund an "overpayment" of tax. Section 6401(b) provides that an excess earned income credit—that is, the amount by which such a credit exceeds the tax otherwise due—"shall be considered an overpayment." It is these two provisions that enabled the Commissioner to refund to petitioner her one-half community share of the earned income credit that she and her husband claimed on their 1981 joint tax return.

Congress established the tax refund intercept program by amending Section 6402 of the Code and by adding Section 464 to the Social Security Act. Section 6402(a) as amended in 1981 provides that the refund of any overpayment shall be made "subject to subsection (c)." Section 6402(c), newly enacted in 1981, in turn provides that "[t]he amount of any overpayment to be refunded * * * shall be reduced by the amount of any past-due support." The necessary effect of this integrated statutory scheme is to authorize the refund of any excess earned income credit, but, at the same time, to require that the amount of any such refund be reduced by any past-due support for which the recipient is liable.

Section 464(a) of the Social Security Act leads inevitably to the same result. It requires the offset of any past-due child support against "any amounts, as refunds of Federal taxes paid, [which] are payable" to a delinquent. As shown above, amounts payable to individuals on account of excess earned income credits are payable "as refunds of Federal taxes paid." There is no other way in which such amounts can find their way into a taxpayer's hands.

2. The overall statutory scheme supports this plain-language construction of the statutes. Section 6305 of the Code, enacted in 1975, empowers the IRS to collect delinquent child support "in the same manner * * * as if such amount were a [delinquent] tax" (26 U.S.C. 6305(a)). This provision clearly authorizes the IRS to levy upon an earned income credit, once it has been refunded to a delinquent, and remit that amount to the state to which he is indebted. Nothing in the Code exempts earned income credits from levy. Petitioner's argument would thus require the IRS to mail the delinquent a check for the earned-income-credit portion of his refund, then turn around and take whatever collection action is necessary to get that money back from him. Congress is unlikely to have intended that the IRS go through these motions when interception at the source would accomplish the same result more efficiently.

3. Considerations of social policy amply support Congress's decision to authorize interception of earned income credits. Congress has long been concerned about the problem of parents who fail to honor their child-support commitments—a problem that in Congress's view has been largely responsible for the "rapid and uncontrolled growth of families on AFDC." S. Rep. 93-1356, 93d Cong., 2d Sess. 44

(1974). Congress believed that interception of tax refunds would be a method of collection less expensive for the government, and less onerous for delinquent parents, than such ancient creditors' remedies as garnishment, seizure of property, and judicial sales. To insist that earned income credits be immune from interception, and that they instead be refunded to taxpayers and seized by these other means, would purposelessly increase the costs of collecting child support. Since those collection costs would be borne by the social welfare system in any event, the result petitioner urges would not do anyone, least of all the poorer members of our society, any good.

ARGUMENT

AN AMOUNT DUE TO BE REFUNDED TO AN INDIVIDUAL BECAUSE OF AN EARNED INCOME CREDIT MAY BE INTERCEPTED BY THE IRS AND APPLIED TO DISCHARGE THAT INDIVIDUAL'S PAST-DUE CHILD SUPPORT OBLIGATIONS

When Congress enacted the AFDC program in 1935, it recognized that a principal cause of children's becoming dependent was the "continued absence [of a parent] from the home." Social Security Act, ch. 531, Tit. IV, § 406(a), 49 Stat. 629. It was not until 1950, however, that Congress took affirmative steps to hold responsible those parents who, by abandoning or deserting their children, caused the children to rely on AFDC funds for support. Social Security Amendments of 1950, ch. 809, § 321(b), 64 Stat. 549-550. Since 1950, Congress has enacted a variety of measures aimed at "securing support from the deserting or abandoning parent in every possible case." H.R. Rep. 544, 90th Cong., 1st Sess. 100 (1967). These measures have required the federal

government to play "a far more active role * * * in undertaking to give direct assistance to the States in locating absent parents and obtaining support payments from them." S. Rep. 93-553, 93d Cong., 1st Sess. 6 (1973).

Congress enacted the tax refund intercept program in 1981 because it concluded that these earlier steps had proven ineffective. The program is a modern, fully-automated system for identifying assets of persons who are delinquent in their child support obligations, and remitting those assets directly to the states to which such individuals are indebted. The individual whose tax refund is thus intercepted suffers no true loss, for the intercepted sum serves to discharge, dollar for dollar, his legal liability on a pre-existing debt. Congress designed the intercept program as an equitable and low-cost alternative to more traditional collection devices, such as garnishment, seizure of property, and judicial sales, which often prove as onerous to debtors as they are costly and cumbersome for creditors.

The question presented here is whether amounts due to be refunded to a person because of an earned income credit are subject to interception under this program. The language of the relevant statutes, the overall statutory scheme, and the underlying legislative policy make it clear that the court of appeals correctly answered this question in the affirmative.

A. Because An Excess Earned Income Credit Is Defined As An Overpayment Of Tax, And Because It Is Paid To The Recipient As A Refund Of Tax, It Is Subject To Interception Under The Plain Language Of The Relevant Statutes

1. As in effect during 1981, Section 43(a) of the Internal Revenue Code provided a credit against income tax based on a percentage of an eligible tax-

payer's "earned income" (26 U.S.C. 43(a)). An eligible taxpayer was defined to include a surviving spouse, a head of household, and a married person whose child lived in the same home (26 U.S.C. 43(c)(1)). The maximum credit allowable was $500. The credit was reduced proportionately to the extent a taxpayer's adjusted gross income exceeded $6,000 but was less than $10,000. No credit was allowable to an individual whose adjusted gross income exceeded $10,000. 26 U.S.C. 43(a) and (b).[5]

Originally enacted in 1975, the earned income credit was intended to correspond roughly to the burden placed on low-income workers by the social security payroll tax. By offsetting that burden, Congress aimed to provide such individuals with an incentive to remain employed rather than to rely on welfare assistance. S. Rep. 94-36, 94th Cong., 1st Sess. 11, 33 (1975). Congress also hoped that the earned income credit would stimulate the economy, since low-income persons were expected to spend a large portion of their thus-increased disposable funds. *Id.* at 11. See generally *Nelson* v. *Regan*, 731 F.2d at 110-111.

Unlike most federal tax credits, the earned income credit has always been "refundable." Most tax credits serve only to reduce or offset the tax that would otherwise be due for a particular year; if a taxpayer's

[5] In 1984, Congress redesignated Section 43 as Section 32 and modified the dollar limitations on the earned income credit. Deficit Reduction Act of 1984, Pub. L. No. 98-369, § 471(c)(1), 98 Stat. 826. Under new Section 32 of the Code, the maximum amount of the credit is $550, and the credit is reduced proportionately as a taxpayer's adjusted gross income rises from $6,500 to $11,000. No credit is allowable to an individual whose adjusted gross income exceeds $11,000. I.R.C. § 32(a) and (b).

aggregate credits exceed his tax liability, the excess is generally useless to him unless it can be carried over to another tax year. See, *e.g.*, I.R.C. § 39 (carryback and carryforward of certain unused credits). The earned income credit, however, like a few other credits,[6] is "refundable" in that it generates a cash refund from the Treasury to the extent it exceeds a person's tax liability for the period at issue. For this reason, the earned income credit is sometimes referred to as a "negative income tax."

The statutory mechanism by which certain tax credits, including earned income credits, are made refundable is embodied in Sections 6401 and 6402 of the Code. Enacted in 1954, those Sections generally authorize the Commissioner to credit or refund "overpayments" as there defined (68A Stat. 791). In normal parlance, of course, an excess earned income credit would not be called an "overpayment," since it does not correspond to any tax actually paid. Upon amending the Code in 1975 to provide for earned income credits, however, Congress likewise amended Section 6401, which is entitled "Amounts treated as overpayments." Tax Reduction Act of 1975, Pub. L. No. 94-12, § 204(a) and (b)(1), 89 Stat. 30-31. As amended in 1975, Section 6401(b), entitled "Excessive credits," provided:

[6] "Refundable credits," whose identity has varied considerably over the years, are now codified in Sections 31 to 35 of the Code. They include the credit for tax withheld on wages (I.R.C. § 31), the earned income credit (I.R.C. § 32), the credit for tax withheld at the source in the case of foreign taxpayers (I.R.C. § 33), the credit for certain uses of gasoline and special fuels (I.R.C. § 34), and the credit for tax overpayments (I.R.C. § 35).

> If the amount allowable as credits under sections 31 (relating to tax withheld on wages), 39 (relating to certain uses of gasoline, special fuels, and lubricating oil), 43 (relating to earned income credit), and 667(b) (relating to taxes paid by certain trusts) exceeds the tax imposed by subtitle A [relating to income taxes] * * *, *the amount of such excess shall be considered an overpayment.*

26 U.S.C. (Supp. V 1975) 6401(b) (emphasis added). Section 6402(a) of the Code, in turn, provided that, "[i]n the case of any overpayment, the Secretary * * * may credit the amount of such overpayment * * * against any liability in respect of an internal revenue tax on the part of the person who made the overpayment *and shall refund any balance to such person.*" 26 U.S.C. (1976 ed.) 6402(a) (emphasis added). It was these two provisions which, prior to 1981, enabled taxpayers to claim, and the Commissioner to make, refunds of the sort petitioner and her husband requested here, *i.e.*, a refund comprising a credit for excess wage-withholding tax and an excess earned income credit. See Pet. App. A4.[7]

2. In 1981, Congress established the tax refund intercept program by amending Section 6402 of the

[7] Section 6401 has undergone several permutations of a technical nature since 1975, none of which affects the question presented here. In 1976, the reference to "[section] 667(b) (relating to taxes paid by certain trusts)" was deleted as a conforming amendment to changes elsewhere in the Code. Tax Reform Act of 1976, Pub. L. No. 94-455, § 701(f)(2) and (3), 90 Stat. 1580. In 1984, Section 6401(b) was rewritten to reflect the renumbering and regrouping of the various Code sections providing for refundable credits. Deficit Reduction Act of 1984, Pub. L. No. 98-369, § 474(r)(36), 98 Stat. 846.

Code and adding a new provision to the Social Security Act. Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, § 2331, 95 Stat. 860. Section 6402(a) was amended to provide that the Commissioner may credit an overpayment, which continued to be defined in Section 6401, against a person's tax, "and shall, *subject to subsection (c)*, refund any balance to such person" (26 U.S.C. 6402(a) (emphasis added)). A new subsection (c) was then added, providing as follows (26 U.S.C. 6402(c)):

> *Offset of past-due support against overpayments*
>
> The amount of any overpayment to be refunded to the person making the overpayment shall be reduced by the amount of any past-due support (as defined in section 464(c) of the Social Security Act) owed by that person of which the Secretary has been notified by a State in accordance with section 464 of the Social Security Act. The Secretary shall remit the amount by which the overpayment is so reduced to the State to which such support has been assigned and notify the person making the overpayment that so much of the overpayment as was necessary to satisfy his obligation for past-due support has been paid to the State. This subsection shall be applied to an overpayment prior to its being credited to a person's future liability for an internal revenue tax.

The operation of new Code Section 6402(c) was bolstered by the addition of Section 464 to the Social Security Act (42 U.S.C. 664). Section 464(c) defined "past-due support" as "the amount of a delinquency, determined under a court [or administrative] order, * * * for support and maintenance of a child, or of a child and the parent with whom the child is living."

Section 464(b) mandated the issuance of regulations prescribing procedures by which state agencies should provide notices of past-due support to the Secretary of the Treasury. And Section 464(a) provided:

> Upon receiving notice from a State agency * * * that a named individual owes past-due support which has been assigned to such State pursuant to [Section 402(a)(26) of the Social Security Act], the Secretary of the Treasury shall determine whether any amounts, as refunds of Federal taxes paid, are payable to such individual (regardless of whether such individual filed a tax return as a married or unmarried individual). If the Secretary of the Treasury finds that any such amount is payable, he shall withhold from such refunds an amount equal to the past-due support, and pay such amount to the State agency * * *.

3. "[A]s with any case involving the interpretation of a statute, [the] analysis must begin with the language of the statute itself." *Touche Ross & Co.* v. *Reddington*, 442 U.S. 560, 568 (1979). The language of the statutes involved here plainly shows that amounts refundable to taxpayers because of excess earned income credits, like all other amounts refundable to taxpayers for any reason, are subject to the tax refund intercept program.

As noted above, Section 6401(b) of the Code defines an "overpayment" to include an excess earned income credit. Section 6402(a), which by its terms applies "[i]n the case of any overpayment," and which authorizes the Commissioner to credit or refund overpayments generally, provides that any such refund shall be made "subject to subsection (c)." And Section 6402(c), which likewise applies in the

case of "any overpayment," provides that "[t]he amount of any overpayment to be refunded * * * shall be reduced by the amount of any past-due support." Reading these three provisions together, it seems obvious that earned income credits are subject to interception. The necessary effect of the integrated statutory scheme is to authorize the refund of any excess earned income credit, but, at the same time, to require that the amount of any such refund be reduced by any past-due support for which the taxpayer is liable. Indeed, the words of the statute, construed in light of normal rules of English grammar and syntax, admit of no other conclusion.

The language of Section 464(a) of the Social Security Act leads inevitably to the same result. It provides that the Secretary of the Treasury "shall determine whether any amounts, as refunds of Federal taxes paid, are payable to [an] individual" delinquent in child support (42 U.S.C. 664(a)). As shown above, "amounts * * * payable to" an individual because of an excess earned income credit are payable "as refunds of Federal taxes paid," given the necessary operation of the relevant Code provisions. Section 464(a) then goes on to require that, "[i]f the Secretary of the Treasury finds that any such amount is payable, he shall withhold from such refunds an amount equal to the past-due support, and pay such amount to the State." Congress could scarcely have chosen words to evidence more clearly its intent that all amounts payable as tax refunds, regardless of their statutory source within the Internal Revenue Code, are subject to interception for delinquencies in child support.

4. a. In an effort to construe the statutes to immunize earned income credits from interception, petitioner subjects the statutory language to constraints that would make Procrustes' victims cringe. Her argument proceeds in three steps. First, she contends that Section 464(a) of the Social Security Act authorizes interception only of refunds of taxes actually paid by a taxpayer (Pet. Br. 14). The earned income credit, she notes, may entitle a taxpayer to a cash payment in excess of his tax liability, and may entitle a person to a cash payment even if he owes or pays no tax (*id.* at 15-16). She accordingly concludes that a payment attributable to an excess earned income credit is not a "refund of Federal taxes paid" within the meaning of Section 464(a), but rather is in the nature of a welfare grant through the mechanism of the tax refund process (Pet. Br. 14-16). In essence, this is the reasoning adopted by the two courts of appeals that have held earned income credits exempt from interception. See *Rucker* v. *Secretary of the Treasury*, 751 F.2d at 356-357; *Nelson* v. *Regan*, 731 F.2d at 111-112. Contra, *Coughlin* v. *Regan*, 584 F. Supp. 697, 706-707 (D. Me. 1984), aff'd on other grounds, No. 84-2015 (1st Cir. July 25, 1985).

The second step of petitioner's argument focuses on the first sentence of Section 6402(c), which may conveniently be quoted once again in full:

> The amount of any overpayment to be refunded to the person making the overpayment shall be reduced by the amount of any past-due support (as defined in section 464(c) of the Social Security Act) owed by that person of which the Secretary has been notified by a State in accordance with section 464 of the Social Security Act.

Petitioner zeroes in on the concluding words of the sentence, "in accordance with section 464 of the Social Security Act." She admits that "one might initially assume" (Pet. Br. 18) that these words modify the immediately preceding clause, viz., "of which the Secretary has been notified by a State." She rejects that construction, however, contending that Section 464 of the Social Security Act "d[oes] not impose requirements on states," so that there is assertedly "nothing in [that] section with which states could act in accordance" (Pet. Br. 18 & n.12). Instead, petitioner argues that the concluding words of the sentence "belatedly modify the words 'shall be reduced' " (*id.* at 18), words which occur (depending on how one counts) some two clauses, four phrases, and 31 words earlier. Since earned income credits, per step one of petitioner's argument, are not "refunds of Federal taxes paid" under Section 464, and since, per step two of her argument, Section 6402 requires refundable overpayments to be "reduced * * * in accordance with" Section 464, Section 6402(c) on petitioner's view is inapplicable to earned income credits.

The third step of petitioner's argument addresses Section 6401(b). She does not have much to say about this, except to note that it "is a general provision adopted before, and independently of, the intercept law" (Pet. Br. 20). Presumably, petitioner means to contend that Section 6401(b)'s definition of "overpayment" to include an excess earned income credit does not apply to Section 6402(c), even though Section 6402(c) requires reduction of "any overpayment" by the amount of past-due child support, because the two sections were not enacted contemporaneously. The Tenth Circuit has taken essentially the same approach to Section 6401(b). *Rucker* v.

Secretary of the Treasury, 751 F.2d at 357. The Second Circuit, more frank to acknowledge the difficulty of that approach, has taken refuge in the notion that "[l]ogic and symmetry have never been the hallmarks of the Internal Revenue Code." *Nelson* v. *Regan*, 731 F.2d at 111-112.

b. Each step of petitioner's argument is seriously flawed. To begin with, Section 464(a) of the Social Security Act does not speak merely of "refunds of Federal taxes paid" by a taxpayer (Pet. Br. 14). Rather, it mandates interception of "any amounts, as refunds of Federal taxes paid, [which] are payable to [an] individual." In order to determine whether amounts are payable to an individual "as refunds of Federal taxes paid," it is necessary to consult the relevant provisions of the Internal Revenue Code. As we have shown, those provisions clearly provide that amounts payable to individuals because of excess earned income credits are payable "as refunds of Federal taxes paid." Indeed, there is no other way in which such amounts can find their way into taxpayers' hands. That is why Congress has denominated earned income credits, like four other species of credits, "refundable credits" in Subtitle A, Chapter I, Subchapter A, Part IV, Subpart C of the Internal Revenue Code.

Petitioner's approach to Section 6402(c) is equally erroneous. It is a commonplace of statutory construction that qualifying phrases are to be read as applying to the immediately preceding phrase or clause, and not to phrases or clauses more remote. K. Llewellyn, *The Common Law Tradition* 527 (1960). There is a venerable doctrine—"the doctrine of the last antecedent"—to this effect. See *First Charter Financial Corp.* v. *United States*, 669 F.2d 1342, 1350 (9th

Cir. 1982); *Quindlen* v. *Prudential Insurance Co.*, 482 F.2d 876, 878 (5th Cir. 1973); *Mandina* v. *United States*, 472 F.2d 1110, 1112 (8th Cir. 1973). Application of this rule here requires that the words "in accordance with section 464 of the Social Security Act" modify "of which the Secretary has been notified by a State," the clause that immediately precedes. Contrary to petitioner's contention (Pet. Br. 18 n.12), this construction produces a perfectly sensible result. Section 464(b) of the Social Security Act directs the issuance of regulations "prescribing the time or times at which States must submit notices of past-due support, the manner in which such notices must be submitted, and the necessary information that must be contained in or accompany the notices." When the Secretary is so notified, obviously, he is "notified by a State in accordance with section 464 of the Social Security Act."

Petitioner's approach to Section 6401(b), finally, is perhaps the weakest link in her chain of argument. The Internal Revenue Code does not throw words around lightly. The word "overpayment" is a term of art that appears 103 times in 64 different sections of the Code. Its meaning is critical to the operation of many of the Code's most important procedural and jurisdictional provisions. Section 6401(b) provides unequivocally that, where the amount of certain credits, including earned income credits, exceeds the tax liability, "the amount of such excess shall be considered an overpayment." Nothing on the face of Section 6401 suggests that this definition is meant to apply to some Code sections but not to others. To the contrary, Section 6401 is the first section appearing in a subchapter entitled "Procedure in General," and it evidently sets forth a rule of generalized applica-

tion. Nor is there anything on the face of Section 6402(c) to suggest that the definition of "overpayment" set forth in Section 6401—which, after all, is the immediately preceding Section—does not apply to it. Indeed, Section 6402(c) says that the amount of "any overpayment" shall be reduced by past-due child support, and its language is thus inclusive rather than exclusive.

Besides giving "overpayment" different meanings in Sections 6401(b) and 6402(c), petitioner's argument makes "overpayment" mean different things within Section 6402 itself. Petitioner would have to concede that Section 6401(b)'s definition of "overpayment" applies to Section 6402(a), which authorizes the Commissioner to credit or refund overpayments. Were this not so, the Commissioner would have had no authority to refund to petitioner her one-half community share of the marital refund, which consisted of an excess earned income credit and a credit for excess wage withholding. See Pet. App. A4. Petitioner's argument thus reduces to a contention that Section 6401(b)'s definition of "overpayment" applies to Section 6402(a), authorizing refunds of overpayments, but not to Section 6402(c), mandating reduction of overpayments. Such a construction, needless to say, would be disfavored in any circumstances. But it would be particularly anomalous here, since Section 6402(a)'s authorization to refund overpayments is conditioned by the explicit cross-reference, "subject to subsection (c)."

It has long been settled that statutes, wherever possible, should be construed consistently with one another. *E.g.*, *Weinberger* v. *Hynson, Wescott & Dunning, Inc.*, 412 U.S. 609, 633-634 (1973); *Woodward* v. *Commissioner*, 397 U.S. 572, 575 (1970); *United States* v. *Gilmore*, 372 U.S. 39, 49 (1963). The construction we urge is faithful to that goal. The construction petitioner urges, by contrast, requires that the same word be given different meanings in contiguous and interrelated sections of the Code, even in cross-referenced subsections of the same section. The sole justification she offers for thus departing from customary rules of statutory construction is that the various provisions involved were not contemporaneously enacted (Pet. Br. 20). Given the frequency with which Congress amends the Internal Revenue Code, and the frequency with which its numerous terms of art recur, petitioner's view, if accepted, would make the Code, not always a model of clarity even to its admirers, a confusing piece of work indeed.

B. The Construction Dictated By The Statutes' Plain Language Is Supported By Related Statutory Provisions And By The Overall Statutory Scheme

In interpreting legislation it is appropriate to consider, not only the applicable words of its particular provisions, but "'the whole statute (or statutes on the same subject) and the objects and policy of the law.'" *Kokoszka* v. *Belford*, 417 U.S. 642, 650 (1974) (quoting *Brown* v. *Duchesne*, 60 U.S. (19 How.) 183, 194 (1856)). The statutory antecedents of the tax refund intercept provisions, as well as their general context, firmly support the plain-language construction that we have outlined above.

1. The tax refund intercept program, as we have already intimated (pages 10-11, *supra*), was not Congress's first attempt to grapple with the problem of parents who desert, abandon, or otherwise fail to sup-

port their children. As early as 1950, Congress required that all state AFDC plans provide for "prompt notice to appropriate law-enforcement officials" when aid was furnished to a deserted or abandoned child. Social Security Amendments of 1950, ch. 809, § 321 (b), 64 Stat. 549-550. In 1967, Congress required the states to ascertain the paternity of children receiving AFDC assistance and to collect support payments on the children's behalf. Social Security Amendments of 1967, Pub. L. No. 90-248, §§ 201 (a)(1), 211(a), 81 Stat. 877-879, 896-897. The states were required to enter into "cooperative arrangements with appropriate courts and law enforcement officials" to carry out these child-support functions. *Id.* § 201(a)(1). The 1967 Act also involved the IRS in this enterprise for the first time, directing the Commissioner, where possible, to provide state agencies with the current addresses of parents delinquent in child support. *Id.* § 211(b) (originally codified at 42 U.S.C. (1970 ed.) 410 (repealed in 1975)).

The statutory antecedents most relevant here are those enacted in 1975. Social Services Amendments of 1974, Pub. L. No. 93-647, § 101, 88 Stat. 2351-2361. Their enactment was prompted by Congress's determination that "most States have not implemented in a meaningful way the provisions of present law relating to the enforcement of child support and establishment of paternity." S. Rep. 93-1356, *supra*, at 46. Congress accordingly concluded that "new and stronger legislative action is required in this area which will create a mechanism to require compliance with the law" (*ibid.*).

The mechanism that Congress adopted in 1975 entailed expanded participation by federal health and

welfare officials, the IRS, and the states. For the first time, applicants for AFDC assistance were required, as a condition of eligibility, to assign to the states any rights to support that they possessed. Pub. L. No. 93-647, § 101(c)(5), 88 Stat. 2359 (adding 42 U.S.C. 602(a)(26)). If a state, despite "diligent and reasonable efforts," was unable to collect through its own collection devices the amounts thus assigned, it was entitled to request assistance from the Secretary of HEW. Pub. L. No. 93-647, § 101(a), 88 Stat. 2351 (adding 42 U.S.C. 652(b)). The Secretary of HEW in turn was required (*ibid.*) to certify the amount of any past-due child support to the Secretary of the Treasury "for collection pursuant to the provisions of section 6305 of the Internal Revenue Code," which was newly enacted for this purpose. Pub. L. No. 93-647, § 101(b)(1), 88 Stat. 2358 (adding 26 U.S.C. 6305).

Section 6305(a) of the Code provides that the Commissioner, upon receiving certification that a person is delinquent in child support, "shall assess and collect the amount [thus] certified * * * in the same manner, with the same powers, and (except as provided in this section) subject to the same limitations as if such amount were a tax imposed by subtitle C [relating to employment taxes] the collection of which would be jeopardized by delay." [8] By empower-

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[8] In providing that the certified amount shall be treated as if it were an employment tax whose collection would be jeopardized by delay, Section 6305(a) means that the Commissioner is empowered to assess, demand payment for, and collect the amount at once, without regard to the procedural restrictions that apply to jeopardy assessments of income taxes. See I.R.C. § 6862 (governing jeopardy assessment of employment taxes); I.R.C. § 6331(a) (authorizing immediate levy

ing the Commissioner to collect past-due child support as if it were a delinquent tax, Section 6305 authorizes the IRS to use its full panoply of tax collection tools—levy and distraint, sale of seized property, lien-foreclosure suits—against "all property and rights to property * * * belonging to" a person whose child-support payments are in arrears. I.R.C. §§ 6321, 6331(a), 6335, 7403(a). See generally *United States* v. *National Bank of Commerce*, No. 84-498 (June 26, 1985), slip op. 6-8. Indeed, the scope of the Commissioner's power to collect past-due child support under Section 6305 is in some respects greater than the scope of his power to collect taxes, since some property that is exempt from levy in satisfaction of unpaid taxes—such as unemployment benefits and certain pension payments—is explicitly made subject to levy where collection of child-support delinquencies is concerned. See I.R.C. § 6305(a)(2), cross-referring to I.R.C. § 6334(a)(4), (6) and (8).

2. For the past ten years, Section 6305 of the Code, in conjunction with Section 452(b) of the Social Security Act, has authorized the IRS to collect duly-certified past-due support from assets in the hands of delinquent parents. Thus, if a delinquent parent prior to 1981 had filed a claim for a tax refund, and if the IRS had mailed him a refund check, the Service could thereafter have levied on that check or its proceeds in satisfaction of the recipient's child-support delinquency. See Treas. Reg. § 301.6305-1(b)(4)(i) (1978). And it would have made no difference in this respect if that refund had had an

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where tax collection is in jeopardy). Cf. I.R.C. § 6861 (providing for deficiency procedures and Tax Court petitions in the case of jeopardy assessments of income, estate, gift, and certain excise taxes).

earned-income-credit component. Neither Section 6305 nor Section 6334 exempts refundable earned income credits from levy, and that component of the refund, like all its other components, would have become part of the delinquent parent's "property [or] rights to property" (I.R.C. § 6331) subject to seizure and remittance to the state. See Note, *In Support of Support: The Federal Tax Refund Offset Program*, 37 Tax Law. 719, 723, 739 (1984).

This being so, it is difficult to believe that Congress intended in 1981 to immunize the earned-income-credit component of tax refunds from collection through the newly-enacted intercept program. Explaining that program, Congress said that "[t]he authority which is provided in current law [*i.e.*, in Code Section 6305] for collection by the Internal Revenue Service of amounts which represent delinquent child support payments would be amplified." H.R. Conf. Rep. 97-208, 97th Cong., 1st Sess. 985 (1981). Congress thus evidenced its intention to *augment* the Commissioner's existing authority to collect past-due child support by giving him a new—and, Congress believed, a more streamlined and cost-effective—collection device. Rather than require the IRS to search out and take collection action against assets in the delinquent parent's possession, the intercept program enables the Commissioner to take assets in his own possession—refunds due the delinquent—and remit them directly to the state. It is absolutely clear that the IRS under Section 6305 can seize an earned income credit, once refunded, from its recipient. See Treas. Reg. § 301.6305-1(b)(4)(iii), cross-referring to Treas. Reg. § 301.6401-1. In contending that such amounts cannot be intercepted, therefore, petitioner would require the IRS to send delinquent parents a check for the earned-income-credit portion of their

refund, then turn around and take whatever collection action is necessary to get the money back once the check is in the mail. There is no reason to believe that Congress intended such an anomalous result.[9]

C. Considerations Of Equity And Social Policy Are Consistent With A Plain-Language Construction Of The Statutes

It is of course well established that "[t]he plain language of [a statute] is controlling unless a different legislative intent is apparent from the [statute's] purpose and history." *Jefferson County Pharmaceutical Ass'n* v. *Abbott Laboratories*, 460 U.S. 150, 157 (1983). As we have shown, the plain language of the statutes involved here demonstrates that refunds attributable to earned income credits, like all other amounts payable as refunds of federal taxes, are subject to interception for past-due child support. There is nothing in the legislative history that suggests a different conclusion; indeed, the evolution of the overall statutory scheme strongly supports the construction we urge. Under these circumstances, the court of appeals was correct in declining to speculate about social policy factors in reaching its decision (Pet. App. A19-A20 & n.1).

Considerations of social policy, in any event, amply support Congress's resolution of the issue. Petitioner describes the earned income credit as a species of social welfare legislation and contends that its objective of providing aid to poor families "would be frustrated by allowing the interception of earned income credit[s]" (Pet. Br. 21). The tax refund intercept program, however, involves a social policy of comparable importance—Congress's determination to respond to the increasing failure of divorced and separated parents to honor their child-support obligations. For the past 35 years, Congress has drawn steadily and with increasing frequency on the resources of the federal government to help states cope with this problem, a problem that in Congress's view has been largely responsible for the "rapid and uncontrolled growth of families on AFDC." S. Rep. 93-1356, *supra*, at 44.[10] As an indication of the depth

[9] Although petitioner asserts (Pet. Br. 20) that "Congress did not intend, and would not have sanctioned, the taking of earned income credit[s]," she offers no evidence to support that assertion. As we have shown, Congress plainly did sanction the taking of earned income credits in 1975, when it empowered the IRS to levy on a delinquent parent's assets in satisfaction of past-due child support and did not exempt earned income credits from levy. Indeed, Section 6305, authorizing collection of past-due support as if it were a delinquent tax, and Section 43, creating earned income credits and authorizing the refund of excess credits, were originally part of the same legislative package (see S. Rep. 93-1356, *supra*, at 2), and were ultimately enacted only three months apart. Compare Social Services Amendments of 1974, Pub. L. No. 93-647, § 101(b)(1), 88 Stat. 2358, with Tax Reduction Act of 1975, Pub. L. No. 94-12, § 204(a), 89 Stat. 30. Petitioner attaches much weight (Pet. Br. 24) to the fact that Congress did not mention earned income credits when it enacted the tax refund intercept program in 1981. But that is hardly surprising. In establishing that program, Congress employed all-inclusive language authorizing the interception of "any overpayment to be refunded" and "any amounts [payable] as refunds of Federal taxes." 26 U.S.C. 6402(c); 42 U.S.C. 664(a). Having used such broad language, Congress obviously had no need to list the various provisions of the Code (be they the earned income credit provisions or otherwise) that might generate refunds to taxpayers.

[10] Evidence before Congress in 1974 showed that about 80% of the 11 million persons then receiving AFDC assistance were

of its concern, Congress has provided that debts for child-support obligations assigned to a state are not dischargeable in bankruptcy. Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, § 2334, 95 Stat. 863 (adding 42 U.S.C. 656(b) and amending 11 U.S.C. 523(a)(5)(A)). Congress has also empowered the IRS to collect child-support debts by levying on unemployment benefits, which for reasons of social policy are exempt from tax levies generally. I.R.C. § 6305(a)(2), cross-referring to I.R.C. § 6334(a)(4). The welfare budgets of many states rely on child-support collections to help fund their AFDC plans, and thus to continue the provision of aid to currently needy families. The intercept program has proved a most effective method of making such collections,[11] and earned income credits represent a sizable

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"on the rolls because they ha[d] been deprived of the support of a parent who ha[d] absented himself from the home." S. Rep. 93-1356, *supra*, at 42. As of early 1984, 8.7 million women headed families with minor children whose fathers were not living in the household; of those women who had been awarded child support, 25% received no payments at all, and another 25% received less than the full payments to which they were entitled. Bureau of the Census, U.S. Dep't of Commerce, *Child Support and Alimony: 1983*, at 1 (July 1985).

[11] The Department of Health and Human Services advises that the intercept program accounts for about 20% of all AFDC collections of past-due support. In recognition of the cost-effectiveness of interception as a collection device, Congress has steadily expanded its use. Effective for tax refunds paid after 1985, Congress has authorized the interception of refunds on behalf of non-AFDC children, as well as on behalf of those receiving AFDC assistance. Child Support Enforce-

component of the sums thus collected.[12]

Contrary to petitioner's contention (Pet. Br. 12), moreover, there is no conflict between the tax refund intercept program and the legislative policy behind earned income credits. The intercept program has no effect on a person's entitlement to an earned income credit. If one is entitled to a credit, he receives the full benefit of it, despite its interception, because it is applied to discharge his legal liability on a preexisting debt.

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ment Amendments of 1984, Pub. L. No. 98-378, § 21, 98 Stat. 1322-1326 (amending 42 U.S.C. 664). See S. Rep. 98-387, 98th Cong., 2d Sess. 38-39 (1984). More broadly, Congress has authorized the IRS to intercept tax refunds "[u]pon receiving notice from *any Federal agency* that a named person owes to such agency a past-due legally enforceable debt." Deficit Reduction Act of 1984, Pub. L. No. 98-369, § 2653, 98 Stat. 1153-1154 (emphasis added) (to be codified at 31 U.S.C. 3720A and I.R.C. § 6402(d)). The latter enactment will enable the use of interception to collect, *e.g.*, student loans and Small Business Administration loans that are in default. The operative language of those provisions is virtually identical to the language of the provisions involved here. Compare 31 U.S.C. 3720A(c) (authorizing interception of "any amounts, as refunds of Federal taxes paid, [which] are payable" to a person indebted to a federal agency) with 42 U.S.C. 664(a) (same); and compare I.R.C. § 6402(d) (requiring offset of such debt against "the amount of any overpayment" refundable to a delinquent) with 26 U.S.C. 6402(c) (same). Petitioner's argument would thus serve to immunize earned income credits from interception to discharge, not only child-support debts, but almost any debt owed to the federal government.

[12] The IRS advises that it intercepted over one million refunds during the 1982-1984 calendar years. The total dollar amount of earned income credits involved in these interceptions, the IRS estimates, is approximately $141 million. The Department of Health and Human Services estimates that earned income credits make up between 15% and 20% of total collections under the intercept program.

Indeed, in invoking the social policy behind earned income credits, petitioner's brief often reads as if the question presented were whether they can, or cannot, be used to discharge a child-support debt. It is absolutely clear, however, that earned income credits can be so used; the only question concerns the collection mechanisms that the creditor may employ against them. Petitioner's husband owes money to the State of Washington, and his child-support debt will be subject to collection in one way or another. The State might collect it, using such ordinary creditors' remedies as contempt proceedings, garnishment, or attachment of property, from any of his nonexempt assets, including his share of the 1981 joint tax refund. See 45 C.F.R. 303.6. Alternatively, if those efforts were unsuccessful, the State could certify the amount of his delinquency for collection by the IRS under Code Section 6305, and the IRS likewise could collect that debt, using such extraordinary remedies as levy and distraint, from any of his nonexempt assets, including his share of the 1981 joint tax refund. The only question presented here is whether the State and the IRS should be required to rely exclusively on these collection devices, or whether they should also be permitted in the case of earned income credits, as they are permitted in the case of tax refunds generally, to use the more efficient and less expensive intercept procedure that Congress adopted in 1981. The costs of collecting delinquent child support will be borne in either event by the social welfare system. It does poor people no good to insist that the transaction costs incident to collection be maximized.[13]

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[13] As the court of appeals noted (Pet. App. A20 n.1), Congress enacted the intercept program in part because it was perceived as an equitable and relatively less onerous mode of collection than (say) garnishment of wages or seizure of property. Congress has specifically exempted certain amounts of wage and salary income from levy in satisfaction of child-support delinquencies, recognizing that individuals rely on such amounts for current living expenses. See I.R.C. §§ 6305(a), 6334(a)(9) and (d). Tax refunds, by contrast, are paid annually in a lump sum, and their diversion to discharge child-support debts is unlikely, generally speaking, to impose comparable hardships.

Finally, there are no special equities that would support a different result for petitioner and her husband in particular. As noted above (page 4, *supra*), the IRS has retained only that portion of the tax refund (including the earned income credit) that belongs to her husband, the party whose child-support payments are delinquent. It is true that all the income reported on the tax return came from petitioner's wages. Washington is a community property state, however, and under its law a tax refund is community property regardless of which spouse's earnings generated the tax (Pet. App. A46). The result is that half of the joint refund belongs to petitioner's husband and was interceptable to discharge his debt. Petitioner did not seek review of that state law holding below and cannot complain of its result here (see Pet. Br. 27 & n.19).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

(STATUTES AS EFFECTIVE IN 1981)

Internal Revenue Code of 1954 (26 U.S.C. (1976 ed. & Supp. V 1981)):

Sec. 43. *Earned Income*

(a) *Allowance of credit*

In the case of an eligible individual, there is allowed as a credit against the tax imposed by this subtitle for the taxable year an amount equal to 10 percent of so much of the earned income for the taxable year as does not exceed $5,000.

(b) *Limitation*

The amount of the credit allowable to a taxpayer under subsection (a) for any taxable year shall not exceed the excess (if any) of—

(1) $500, over

(2) 12.5 percent of so much of the adjusted gross income (or, if greater, the earned income) of the taxpayer for the taxable year as exceeds $6,000.

(c) *Definitions*

For purposes of this section—

(1) *Eligible individual*

(A) *In general*

The term "eligible individual" means an individual who, for the taxable year—

(i) is married (within the meaning of section 143) and is entitled to a deduction under section 151 for a child

(within the meaning of section 151(e)(3)),

(ii) is a surviving spouse (as determined under section 2(a)), or

(iii) is a head of a household (as determined under subsection (b) of section 2 without regard to subparagraphs (A)(ii) and (B) of paragraph (1) of such subsection).

(B) *Child must reside with taxpayer in the United States*

An individual shall be treated as satisfying clause (i) of subparagraph (A) only if the child has the same principal place of abode as the individual and such abode is in the United States. An individual shall be treated as satisfying clause (ii) or (iii) of subparagraph (A) only if the household in question is in the United States. * * *

(2) *Earned income*

(A) The term "earned income" means—

(i) wages, salaries, tips, and other employee compensation, plus

(ii) the amount of the taxpayer's net earnings from self-employment for the taxable year (within the meaning of section 1402(a)).

(B) For purposes of subparagraph (A)—

(i) the earned income of an individual shall be computed without regard to any community property laws.

(ii) no amount received as a pension or annuity shall be taken into account, and

(iii) no amount to which section 871(a) applies (relating to income of nonresident alien individuals not connected with United States business) shall be taken into account.

(d) *Married individuals*

In the case of an individual who is married (within the meaning of section 143), this section shall apply only if a joint return is filed for the taxable year under section 6013.

(e) *Taxable year must be full taxable year*

Except in the case of a taxable year closed by reason of the death of the taxpayer, no credit shall be allowable under this section in the case of a taxable year covering a period of less than 12 months.

(f) *Amount of credit to be determined under tables*

(1) *In general*

The amount of the credit allowed by this section shall be determined under tables prescribed by the Secretary.

(2) *Requirements for tables*

The tables prescribed under paragraph (1) shall reflect the provisions of subsections (a) and (b) and shall have income brackets of not greater than $50 each—

(A) for earned income between $0 and $10,000, and

(B) for adjusted gross income between $6,000 and $10,000.

(g) *Coordination with advance payments of earned income credit*

(1) *Recapture of excess advance payments*

If any payment is made to the individual by an employer under section 3507 during any calendar year, then the tax imposed by this chapter for the individual's last taxable year beginning in such calendar year shall be increased by the aggregate amount of such payments.

(2) *Reconciliation of payments advanced and credit allowed*

Any increase in tax under paragraph (1) shall not be treated as tax imposed by this chapter for purposes of determining the amount of any credit (other than the credit allowed by subsection (a)) allowable under this subpart.

* * * * *

Sec. 6305. *Collection of certain liability*

(a) *In general*

Upon receiving a certification from the Secretary of Health, Education, and Welfare, under section 452(b) of the Social Security Act with respect to any individual, the Secretary shall assess and collect the amount certified by the Secretary of Health, Education, and Welfare, in the same manner, with the same powers, and (except as provided in this section) subject to the same limitations as if such amount were a tax imposed by subtitle C the collection of which would be jeopardized by delay, except that—

(1) no interest or penalties shall be assessed or collected,

(2) for such purposes, paragraphs (4), (6), and (8) of section 6334(a) (relating to property exempt from levy) shall not apply,

(3) there shall be exempt from levy so much of the salary, wages, or other income of an individual as is being withheld therefrom in garnishment pursuant to a judgment entered by a court of competent jurisdiction for the support of his minor children, and

(4) in the case of the first assessment against an individual for delinquency under a court or administrative order against such individual for a particular person or persons, the collection shall be stayed for a period of 60 days immediately following notice and demand as described in section 6303.

* * * * *

Sec. 6401. *Amounts treated as overpayments*

(a) *Assessment and collection after limitation period*

The term "overpayment" includes that part of the amount of the payment of any internal revenue tax which is assessed or collected after the expiration of the period of limitation properly applicable thereto.

(b) *Excessive credits*

If the amount allowable as credits under sections 31 (relating to tax withheld on wages) and 39 (relating to certain uses of gasoline, special fuels, and lubricating oil), and 43 (re-

lating to earned income credit), exceeds the tax imposed by subtitle A (reduced by the credits allowable under subpart A of part IV of subchapter A of chapter 1, other than the credits allowable under sections 31, 39, and 43), the amount of such excess shall be considered an overpayment. * * *

* * * * *

Sec. 6402. *Authority to make credits or refunds*

(a) *General rule*

In the case of any overpayment, the Secretary, within the applicable period of limitations, may credit the amount of such overpayment, including any interest allowed thereon, against any liability in respect of an internal revenue tax on the part of the person who made the overpayment and shall, subject to subsection (c), refund any balance to such person.

* * * * *

(c) *Offset of past-due support against overpayments*

The amount of any overpayment to be refunded to the person making the overpayment shall be reduced by the amount of any past-due support (as defined in section 464(c) of the Social Security Act) owed by that person of which the Secretary has been notified by a State in accordance with section 464 of the Social Security Act. The Secretary shall remit the amount by which the overpayment is so reduced to the State to which such support has been assigned and notify the person making the overpayment that so much of the overpayment as was necessary to satisfy his obligation for past-due support has been paid to the State. This subsection shall be applied to an overpayment prior to its being credited to a person's future liability for an internal revenue tax.

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42 U.S.C. (1976 ed. & Supp. V 1981):

Sec. 652. *Duties of Secretary*

* * * * *

(b) *Certification of child support obligations to Secretary of Treasury for collection*

The Secretary shall, upon the request of any State having in effect a State plan approved under this part, certify to the Secretary of the Treasury for collection pursuant to the provisions of section 6305 of the Internal Revenue Code of 1954 the amount of any child support obligation (including any support obligation with respect to the parent who is living with the child and receiving aid under the State plan approved under part A of this subchapter) which is assigned to such State or is undertaken to be collected by such State pursuant to section 654(6) of this title. No amount may be certified for collection under this subsection except the amount of the delinquency under a court or administrative order for support and upon a showing by the State that such State has made diligent and reasonable efforts to collect such amounts utilizing its own collection mechanisms, and upon an agreement that the State will reimburse the Secretary of the Treasury for any costs involved in making the collection. All reimbursements shall

be credited to the appropriation accounts which bore all or part of the costs involved in making the collections. The Secretary after consultation with the Secretary of the Treasury, may, by regulation, establish criteria for accepting amounts for collection and for making certification under this subsection including imposing such limitations on the frequency of making such certifications under this subsection.

* * * * *

Sec. 664. *Collection of past-due support from Federal tax refunds*

(a) *Procedures applicable; distribution*

Upon receiving notice from a State agency administering a plan approved under this part that a named individual owes past-due support which has been assigned to such State pursuant to section 602(a)(26) of this title, the Secretary of the Treasury shall determine whether any amounts, as refunds of Federal taxes paid, are payable to such individual (regardless of whether such individual filed a tax return as a married or unmarried individual). If the Secretary of the Treasury finds that any such amount is payable, he shall withhold from such refunds an amount equal to the past-due support, and pay such amount to the State agency (together with notice of the individual's home address) for distribution in accordance with section 657(b)(3) of this title.

(b) *Regulations; contents, etc.*

The Secretary of the Treasury shall issue regulations, approved by the Secretary of Health

and Human Services, prescribing the time or times at which States must submit notices of past-due support, the manner in which such notices must be submitted, and the necessary information that must be contained in or accompany the notices. The regulations shall specify the minimum amount of past-due support to which the offset procedure established by subsection (a) of this section, may be applied, and the fee that a State must pay to reimburse the Secretary of the Treasury for the full cost of applying the offset procedure, and provide that the Secretary of the Treasury will advise the Secretary of Health and Human Services, not less frequently than annually, of the States which have furnished notices of past-due support under subsection (a) of this section, the number of cases in each State with respect to which such notices have been furnished, the amount of support sought to be collected under this subsection by each State, and the amount of such collections actually made in the case of each State.

(c) *"Past-due support" defined*

As used in this part the term "past-due support" means the amount of a delinquency, determined under a court order, or an order of an administrative process established under State law, for support and maintenance of a child, or of a child and the parent with whom the child is living.

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REPLY

BRIEF

No. 84-1686

In The
Supreme Court of the United States
October Term, 1984

MARIE D. SORENSON, on behalf of herself and all others similarly situated,

Petitioner,

v.

THE SECRETARY OF THE TREASURY OF THE UNITED STATES and THE UNITED STATES OF AMERICA,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF OF PETITIONER

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SUMMARY

The earned income credit benefit program was enacted to "provide relief to families who . . . had been hurt the most by rising food and energy costs." S. Rep. No. 94-36 (Finance Comm.), 94th Cong., 1st Sess. 12, *reprinted in* 1975 U.S. Code Cong. & Ad. News 54, 64. Recipients of the benefits must have earned income and must have needy dependent children living with them to be eligible. The Secretary's brief ignores the direct effects of interception of earned income credit benefits. If benefits are intercepted, they cannot be used by working-poor families to purchase basic necessities.

The Secretary's contention that interception is harmless because benefits not intercepted would simply be seized after payment is mistaken. The intercept program is a mandatory program; states must certify names of debtors whether or not they deem collection appropriate. The alternative Federal collection program discussed by the Secretary is invoked only at the states' discretion; its use is rare and would be inappropriate and unlikely in the typical earned income credit benefit case. Seizure of earned income credit benefits under state collection programs would be subject to the limitations imposed by state law and policy.

To reach a harsh result never conceived of by Congress, the Secretary takes unwarranted liberties with the statutory language in two respects. First, he treats the words "of Federal taxes paid" in § 464 of the Social Security Act as surplusage. When they are treated as meaningful, § 464 is not susceptible to the Secretary's interpretation. The earned income credit is a "refundable" credit, but earned income credit benefits are not "refunds *of Federal taxes paid.*"

Next, the Secretary ignores the literal meaning of the words "in accordance with" in § 6402(c) of the Internal Revenue Code. They cannot sensibly modify what the Secretary would have them modify. They should be read as limiting reductions of overpayments under § 6402(c) to those required by § 464 of the Social Security Act. Such an interpretation does not involve the assignment of more than one meaning to the statutory term "overpayment," as the Secretary supposes. It merely acknowledges the fact that some overpayments correspond to refunds of Federal taxes paid and some do not.

A fair reading of the statutory provisions, giving effect to all of the language employed by Congress, produces a result that promotes the purposes of both the earned income credit benefit program and the intercept program: refunds of Federal taxes paid are subject to interception; earned income credit benefits are not.

—o—

ARGUMENT

1. Interception harms earned income credit beneficiaries including needy children

The Secretary's portrait of the effects of interception on those whose funds are intercepted omits essential features. It obscures the fact that there is a needy child living with and dependent on each recipient of an earned income credit benefit. That child will be deprived of the benefit if the Secretary prevails.[1]

1. Amicus implies that one may be eligible for an earned income credit benefit based on a dependent child living elsewhere for whom one is failing to provide support. Am. Br. 12. In fact, § 32 of the Internal Revenue Code makes it a condition of eligibility that the dependent child reside with the individual applying for the benefit.

"The individual whose tax refund is . . . intercepted," the Secretary asserts, "*suffers no true loss,* for the intercepted sum serves to discharge . . . his legal liability on a preexisting debt." Resp. Br. 11 (emphasis added). To arrive at such a conclusion, the Secretary must ignore one of the principal purposes of the earned income credit benefit program: to "provide relief to families who . . . had been hurt the most by rising food and energy costs." S. Rep. No. 94-36, *supra.* Working-poor families whose benefits are intercepted cannot use them as Congress intended to buy food or fuel. These families experience a "true loss."

The Secretary goes on to argue that interception of earned income credit benefits is harmless because benefits not intercepted before payment may be seized after payment under the authority of § 6305(a) of the Internal Revenue Code.[2] But states have discretion to use or not use the § 6305(a) procedures, and earned income credit benefits would not be appropriate or likely objects of collection efforts under § 6305(a).

The intercept program is a mandatory program in which states are required by § 454(18) of the Social Security Act to participate. *See also* 45 C.F.R. §§ 303.6(f) and 303.72. States certify names of debtors to the Secretary of the Treasury under the intercept program regardless of whether they have determined that the debtor is unable to pay support, and even when (as in the case of the husband of class member Lorna Kyllonen, CR 13) the state

2. The text of § 6305(a) is set forth at Resp. Br. 4a. The text of § 452(b) of the Social Security Act, which identifies the circumstances under which the collection procedures described in § 6305(a) may be used, is set forth at Resp. Br. 7a.

has reached a payment agreement with the debtor and the debtor is current in payments under the agreement.

By contrast, a request for "full collection procedures by the Secretary of the Treasury" pursuant to § 6305(a) of the Internal Revenue Code and 45 C.F.R. § 303.71 involves an exercise of discretion by a state. A state could not make such a request, for example, after entering into a payment agreement with a debtor, so long as the debtor was complying with the agreement.

In deciding whether to use the § 6305(a) collection procedures, a state may consider the effect collection might have on children currently residing with and dependent on a debtor. A major aim of state support-collection efforts is, after all, to benefit needy children, and states have no reason to favor one needy child over another. As explained in petitioner's opening brief at p. 22 n. 14, a child in a working-poor family eligible for an earned income credit benefit may be more needy than a child in a similarly situated family supported entirely by AFDC. It would be appropriate for a state to decline use of the § 6305(a) procedures against a debtor supporting a minor child under such impoverished circumstances as would result in eligibility for an earned income credit benefit.

As a practical matter, the alternative Federal collection procedures are rarely used by states. *See* Office of Child Support Enforcement, U.S. Dept. of Health and Human Services, 9 Office of Child Support Enforcement Ann. Rep. 102-104 (1984). State support-collection programs rely primarily on state collection procedures. Whether earned income credit benefits may be seized after payment under state collection procedures depends on state law. The benefits intercepted in petitioner's case would have been exempt from seizure under Washington

state law because they resulted from *her* earnings while the support obligation being enforced was her husband's and not hers. *See Van Dyke v. Thompson*, 95 Wn.2d 726, 630 P.2d 420 (1981).[3]

The Secretary is mistaken when he contends that allowing earned income credit benefits to reach the families for which they were intended "would not do anyone . . . any good." Resp. Br. 10. It would allow working-poor families to use the benefits as Congress intended—to purchase basic necessities.

2. The Secretary's analysis takes unwarranted liberties with the statutory language

A. Social Security Act, § 464(a)—"refunds of Federal taxes paid"

As the Secretary demonstrates (Resp. Br. 11-16), the words "overpayment" and "refund" or "refundable" have peculiar uses in the Internal Revenue Code. "Overpayments" and "refunds" may occur when there have been no *payments*. The parties agree that funds owed as a result of the earned income credit are "considered overpayments" and are spoken of as being "refunded." It was by treating earned income credits as "overpayments" and making them "refundable" that a mechanism was designated for their payment. It is only because earned income credit benefits *are* paid through the refund process that the current controversy has arisen.

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3. The Secretary mistakenly asserts that "[p]etitioner's husband owes money to the State of Washington, and his child-support debt will be subject to collection one way or another." Resp. Br. 32. When a debtor like Mr. Sorenson is disabled and unable to pay support, the debt may not be subject to collection under state law.

In response to the holdings of the Second Circuit in *Nelson v. Regan*, 731 F.2d 105, *cert. denied*, 105 S. Ct. 175 (1984), and the Tenth Circuit in *Rucker v. Secretary of the Treasury*, 751 F.2d 351 (1984), that earned income credit benefits are not "refunds of Federal taxes paid" as those words are used in § 464 of the Social Security Act, the Secretary notes that earned income credits are "refundable." Having noted that earned income credits are "refundable," the Secretary assumes he has shown that earned income credit benefits are refunds *"of Federal taxes paid."* Resp. Br. 17. The first sentence of § 464(a), in which the words appear, reads as follows:

> Upon receiving notice from a State agency administering a plan approved under this part that a named individual owes past-due support which has been assigned to the State . . . the Secretary of the Treasury shall determine whether any amounts, as refunds of Federal taxes paid, are payable to such individual . . . .

The Secretary assumes that anything "refundable" is a "refund of Federal taxes paid." His argument implicitly presumes that the words "of Federal taxes paid" are surplusage.

This Court, by contrast, ordinarily presumes that every word used by Congress is to be given effect, if possible. *See Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979). If the words "of Federal taxes paid" are treated as meaningful, the Secretary's argument that § 464(a) authorizes the interception of earned income credit benefits fails since, as the Secretary acknowledges, an earned income credit "does not correspond to any tax actually paid."[4] Resp. Br. 13.

There is no reason to disregard the plain meaning of the words "of Federal taxes paid." Their presence in § 464(a) provides the basis for distinguishing between the general term "refund," *i.e.*, any payment made through the refund process,[5] and "refunds of Federal taxes paid," *i.e.*, a subset of "refunds" corresponding to taxes actually paid.

The Second Circuit in *Nelson* and the Tenth Circuit in *Rucker* appropriately gave the words "of Federal taxes paid" their ordinary meaning. They correctly held that § 464(a), which only authorizes intereception of refunds *of Federal taxes paid*, does not authorize intereception of earned income credit benefits.

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4. The Ninth Circuit attempted to avoid this problem by reordering the words in § 464(a), treating the statute as if the word "payable" preceded the words "as refunds of Federal taxes paid." With this unwarranted rewriting, the court concluded that the statute applied to anything payable in the way that refund of Federal taxes are paid. *See* Pet. Br. 16-17. Amicus has apparently been misled by the Ninth Circuit's opinion into thinking that the word "payable" actually *does* precede "as refunds of Federal taxes paid." When it purports to quote from the statutory language on page 9 of its brief, the word "payable" appears in the position that would facilitate the interpretation it supports, rather than the position in which it was placed by Congress.

5. When used as a noun, the word "refund" refers to "that which is refunded." *United States v. Wurts*, 303 U.S. 414, 417 (1938), *quoting from* Webster's New International Dictionary, 2d. Ed., Unabridged. Until my refund has actually been issued, there are no funds which can properly be referred to as "my refund." It is for this reason that legislative drafters must resort to such awkward phrases as "any amounts, as refunds of Federal taxes paid, payable to such individual." The amount, if any, that would be payable as a refund can, of course, be determined, even though there is, as yet, no refund.

B. Internal Revenue Code, §6402(c)—"in accordance with section 464"

The dispute between the parties over the meaning of § 6402(c) of the Internal Revenue Code turns on the reference of the words "in accordance with section 464 of the Social Security Act" in the first sentence. The first sentence of § 6402(c) reads as follows:

> The amount of any overpayment to be refunded to the person making the overpayment shall be reduced by the amount of any past-due support (as defined in section 464(c) of the Social Security Act) owed by that person of which the Secretary has been notified by a State in accordance with section 464 of the Social Security Act.

Relying on the doctrine of the last antecedent, the Secretary contends that the words "in accordance with section 464 of the Social Security Act" modify the phrase "of which the Secretary has been notified by a State." Petitioners contends that they modify the verb "shall be reduced," so that § 6402(c) authorizes the Secretary to reduce overpayments in accordance with § 464.

"In construing statutes, qualifying phrases are *generally* applied to the immediately preceding phrase . . . ," *First Charter Financial Corp. v. United States*, 669 F.2d 1342, 1350 (9th Cir. 1981) (emphasis added), but "the rule of the last antecedent does not apply where the context indicates otherwise . . . ." *Marshall v. Springville Poultry Farm, Inc.*, 445 F.Supp. 2, 3 (M.D. Pa. 1977).[6]

When a statute directs a person to do something, and the person does it, then the person is properly said to have acted "in accordance with" the statutory directive. The problem with the Secretary's argument is that § 464 of the Social Security Act does not direct states to give notice to the Secretary of the Treasury. Consequently, it contains no directive with which the states can act in accordance when they give such notice.

Section 464(b) directs *the Secretary* to issue regulations regarding notice. When the Secretary issues such regulations, *he* acts in accordance with § 464. When a state gives a notice as directed by the Secretary's regulations, *it* acts in accordance not with § 464 but rather with the regulations and with § 454(18) of the Social Security Act which requires states to participate in the intercept program.

In support of his conclusion that notices given by the states are given in accordance with the statutory directive that the Secretary issue regulations, the Secretary offers

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6. The Secretary's citation to *The Common Law Tradition* in this connection is ironic. Llewellyn demonstrated, in the appendix cited, that "there are two opposing canons on almost every point [of statutory construction]." *Id.* at 521. He set these opposing canons off in the form of "thrusts" and "parries." So, corresponding to the thrust cited by the Secretary ("Qualifying or limiting words or clauses are to be referred to the next preceding antecedent") Llewellyn supplied the parry ("Not when evident sense and meaning require a different construction"). *Id.* at 527. Llewellyn offered the following caution about the use of canons of construction: "Plainly, to make any canon take hold in a particular instance, the construction contended for must be sold, essentially, by means other than the use of the canon: The good sense of the situation and a simple construction of the available language to achieve that sense, by tenable means, out of the statutory language." *Id.* at 521 (emphasis in original).

only the argument that it is "obvious." Resp. Br. 21. He simply ignores the distinction between acting in accordance with § 464 and acting in accordance with implementing regulations and with § 454.

The Secretary's assertion that "the words of the statute, construed in light of normal rules of English grammar and syntax, admit of no other conclusion" (Resp. Br. 17) is mistaken. If one attends to the plain distinction just discussed, another conclusion is compelled: the words "in accordance with" qualify the verb "shall be reduced." This qualification produces consistency between § 464 of the Social Security Act and § 6402(c) of the Internal Revenue Code by providing that reductions of overpayments authorized by the latter be made only in accordance with the former.

The Secretary places great emphasis on the point that, under the Internal Revenue Code, earned income credits are considered "overpayments." The point is correct, but it does not establish the Secretary's conclusion that earned income credit benefits may be intercepted. Contrary to the Secretary's impression, petitioner does not advocate the assignment of more than one meaning to the term "overpayment." Her position is rather that not all "overpayments" are subject to interception, only those whose interception is authorized by § 464 of the Social Security Act.

To say that not all overpayments are subject to interception is not to imply that the term "overpayment" has more than one meaning. Not all mammals are elephants. This does not imply that the term "mammal" has more than one meaning; only that there are different kinds of

mammals. Some mammals are elephants; some are not. Similarly, some "overpayments" correspond to "refunds of Federal taxes paid"; earned income credit benefits do not.

Section 6402(c) of the Internal Revenue Code directs the Secretary to reduce overpayments in accordance with § 464 of the Social Security Act; it does not direct the Secretary to reduce *all* overpayments. Section 464 only authorizes the interception of "refunds of Federal taxes paid." Consequently, § 6402(c) should be construed to authorize the reduction of "overpayments" that correspond to "refunds of Federal taxes paid."

CONCLUSION

A fair reading of the statutory provisions, giving effect to all of langunge employed by Congress, produces a result that promotes the purposes of both the earned income credit benefit program and the intercept program: refunds of Federal taxes paid are subject to interception; earned income credit benefits are not. This Court should hold that the Secretary is not authorized to intercept earned income credit benefits. That portion of the judgment below which held to the contrary should be reversed.

Respectfully submitted,

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December 1985

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AMICUS CURIAE

BRIEF

NO. 84-1686

In The

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MARIE D. SORENSON, on behalf of herself and all others similarly situated,
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Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

AMICUS CURIAE BRIEF OF THE STATE OF CONNECTICUT IN SUPPORT OF THE RESPONDENTS

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INTEREST OF AMICUS CURIAE

This brief is submitted by the State of Connecticut as amicus curiae pursuant to Supreme Court Rule 36.4.

The State of Connecticut, as the State of Washington, and all the other fifty states of the United States, participates in the federal "tax intercept" program which provides for the interception of refunds resulting from overpayment of taxes to be applied to child-support arrearages.

At the time that this action was brought, interception of such tax refunds was limited to cases where the child-support payments had been assigned pursuant to § 402(a)(26) of the Social Security Act (42 USC § 602(a)(26).[1] Interception of such tax refunds due individuals owing child-support obligations was authorized by the Omnibus Budget Reconciliation Act of 1981, Public Law 97-35, § 2331.

In Connecticut, an action challenging certain aspects of the implementation of the tax intercept program was initiated in the United States District Court, District of Connecticut. One of the results of that action was a ruling by the District Court, Ellen B. Burns, Judge, that earned income credits due low-income individuals under § 43(a) of the Internal Revenue Code are not subject to the intercept program (*Nelson v. Regan*, 560 F. Supp. 1011, 1109-111 (D. Conn. 1983)). The ruling of the District Court in *Nelson*, which was a class action, required that the Internal Revenue Service must refund to the taxpayers in Connecticut any portion of a tax refund intercepted that was attributable to an earned income credit, and held that the Internal Revenue Service was not to intercept the portions of a tax refund attributable to an earned income credit in future years.

The decision of the District Court in *Nelson v. Regan*, *supra*, was affirmed on all issues raised on appeal, including the issue of earned income credits, by the United States Court of Appeals for the Second Circuit in *Nelson v. Regan*, 731 F.2d 105 (2nd Cir. 1984), *cert. denied*, 105 S.Ct. 175 (1984).

At the time this Court denied certiorari in *Nelson*, there did not exist a conflict in the circuit courts on the issue of the susceptibility of earned income credits to the tax intercept program. The United States Court of Appeals for the Ninth Circuit in *Sorenson v. Secretary of the Treasury* in 752 F.2d 1433, has now ruled that earned income credits are subject to interception for past-due child support as part of a tax refund; therefore a conflict now exists between the courts of appeal on this issue.

It is of substantial interest to the State of Connecticut that this Court affirm the decision of the Court of Appeals for the Ninth Circuit in *Sorenson* on the issue of earned income credits. For the State of Connecticut's fiscal year beginning July 1, 1983, and ending June 30, 1984, a total of $4,953,500 was received by the state from the Internal Revenue Service as a result of the interception of tax refunds for payment of past-due child support assigned to the state.[2] Many tax refunds intercepted by the Internal Revenue Service had an earned income credit component.

[1] It should be noted that the decision of this Court on the susceptibility of earned income credits to the Internal Revenue Service tax intercept program will not only impact on the states, but will now impact on children and custodial parents not receiving assistance under the AFDC program, as the Child Support Enforcement Amendments of 1984, Pub. Act 98-378, enacted August 16, 1984, provided in § 21 that § 464(a) of the Social Security Act be amended by redesignating subsection (a) as (a)(1) and providing for the collection of past-due child support from federal tax refunds after December 31, 1985, when the family is not receiving AFDC if they have applied for support enforcement services from a state and the state has agreed to collect support under § 454(6) of the Social Security Act.

[2] *IV-D Accomplishment Report* Produced by the Child Support Division of the Department of Human Resources, produced under the auspices of James G. Harris, Jr., Commissioner, Connecticut Department of Human Resources.

SUMMARY OF ARGUMENT

Earned income credits are subject to interception by the Internal Revenue Service for past-due support under the statutory scheme set forth in the Internal Revenue Code and the Social Security Act, and pursuant to the intent of Congress.

ARGUMENT

I.

EARNED INCOME CREDITS ARE SUBJECT TO OFFSET AGAINST PAST-DUE SUPPORT UNDER THE TAX INTERCEPT PROGRAM

A. The statutory language provides that earned income credits are subject to the tax intercept program

1. The Internal Revenue Code.

The United States Court of Appeals for the Ninth Circuit in *Sorenson v. Secretary of the Treasury*, supra, correctly concluded that the Internal Revenue Code defines an earned income credit paid to a taxpayer as an "overpayment" and that past-due support assigned to a state was subject to offset against such "overpayment."

To determine what constitutes an "overpayment," one must first examine the treatment of the term as set forth in the *Internal Revenue Code*, 26 USC § 6401, prior to an amendment of that section in 1984 when it provided:

> (a) The term '*overpayment*' includes that part of the amount of the payment of any internal revenue tax which is assessed or collected after

> the expiration of the period of limitation properly applicable thereto.
>
> (b) If the amount allowable as credits under sections 31 (relating to tax withheld on wages) and 39 (relating to certain uses of gasoline, special fuels, and lubricating oil), and 43 (relating to earned income credit) exceeds the tax imposed by subtitle A (reduced by the credits allowable under subpart A of part IV of subchapter A of Chapter 1, other than the credits allowable under sections 31, 39, and 43), *the amount of such excess shall be considered an overpayment.* For the purposes of the preceding sentence, any credit allowed under paragraph (1) of section 32 (relating to withholding of tax on nonresident aliens and on foreign corporations) to a nonresident alien individual for a taxable year with respect to which an election under section 6013(g) or (h) is in effect shall be treated as an amount allowable as a credit under section 31.
>
> (c) An amount paid as tax shall not be considered not to constitute an *overpayment* solely by reason of the fact that there was no tax liability in respect of which such amount was paid. (emphasis supplied)

Public Law 98-369, § 474(r)(36), adopted July 18, 1984, amended 26 USC § 6401. Included in the amendment was a change in the structure and language of subsection(b), dividing subsection(b) into subsections(1) and (2) and providing in (b)(1) as follows:

> If the amounts allowable as credits under subpart C of part IV of subchapter A of chapter 1 (relating to refundable credits) exceeds the tax imposed by subtitle A (reduced by the credits allowable under

subparts A, B and D of such part IV), the amounts of such excess shall be considered an over payment."

Earned income credits are a credit allowable under subpart C of subchapter A of Chapter 1. Therefore, Congress, in the 1984 amendment, still chose to treat earned income credits as an "overpayment."

Congress established the tax intercept program by amendments to the Social Security Act and the Internal Revenue Code in the Omnibus Budget Reconciliation Act of 1981 (OBRA), P. L. No. 97-35, 95 Stat. 347, 860-63, § 2331 (1981). Section 2331(c) of the OBRA amended the Internal Revenue Code providing for the offset of past-due support against "overpayments" by an amendment to 26 USC § 6402. Section 2331(c), amended 26 USC § 6402 by adding subsection(c) and by including a reference to subsection(c) in subsection(a). After the amendment made by OBRA § 2331(c), § 6402 read as follows:

(a) General rule. — In the case of any overpayment, the Secretary or his delegate, within the applicable period of limitations, may credit the amount of such overpayment, including any interest allowed thereon, against any liability in respect of any internal revenue tax on the part of *the person who made the overpayment* and shall, subject to subsection(c), *refund any balance to such person.*

(b) Credits against estimated tax. — The Secretary is authorized to prescribe regulations providing for the crediting against the estimated income tax for any taxable year of the amount determined by the taxpayer or the Secretary to be an overpayment of the income tax for a preceding taxable year.

(c) Offset of past-due support against overpayments. — The amount of *any overpayment to be refunded to the person making the overpayment* shall be reduced by the amount of any past-due support (as defined in section 464(c) of the Social Security Act) owed by that person of which the Secretary has been notified by a State in accordance with section 464 of the Social Security Act. The Secretary shall remit the amount by which the overpayment is so reduced to the State to which such support has been assigned and notify the person making the overpayment that so much of the overpayment as was necessary to satisfy his obligation for past-due support has been paid to the State. This subsection shall be applied to an overpayment prior to its being credited to a person's future liability for an internal revenue tax. (Emphasis added.)

The petitioner argues that because § 6401 was amended in 1975 at the time of the creation of the earned income benefits program, the definition of "overpayment" in that section does not apply to the intercept program, although § 6402(c) provides for the offset of past-due support against "any overpayment." Based upon this slender reed, the petitioner reasons, as did the courts in *Nelson v. Regan, supra,* and *Rucker v. Secretary of the Treasury,* 751 F.2d 351 (10th Cir. 1984), that the definition of the term "overpayment" in § 6401 should be ignored.

As the Ninth Circuit pointed out in *Sorenson, supra* at 1442-1443, a credit, including an earned income credit, may not be an "overpayment" as the term is normally used, but for the purpose of the Internal Revenue Code, an earned income credit is defined as an overpayment and treated as a refund of taxes that have been overpaid.

Congress has defined in the Internal Revenue Code the term "overpayment" of taxes paid. Such definition includes certain credits, including earned income credits. Credits, such as the earned income credit, are to be treated as a refund of taxes that have been overpaid. It follows that the Court is bound by such construction and should apply it.[3]

This Court should apply the construction that the Court of Appeals for the Ninth Circuit applied; that § 6402 provides for an offset of support against refunds of overpayments of taxes paid, and that an overpayment of taxes paid includes any amounts payable as an earned income credit. The construction or definition of the term "overpayment," even if there is no tax liability in § 6401, does not, as maintained by the petitioner, conflict with § 464(a) of the Social Security Act, (42 USC § 664), as will be shown.

2. The Social Security Act.

Section 2331(a) of the Omnibus Budget Reconciliation Act provided for the offset of unpaid support, assigned to the state in Aid to Families with Dependent Children (AFDC) cases pursuant to § 402(a)(26) of the Social Security Act, against overpayments by amending the Social Security Act by adding a new § 464(a), codified as 42 USC § 664, which provides:

> Upon receiving notice from a State agency administering a plan approved under this part that a named individual owes past-due support which has been assigned to such State pursuant to section 402(a)(26), *the Secretary of the Treasury shall determine whether any amounts, as refunds of Federal taxes paid, are payable to such individual* (regardless of whether such individual filed a tax return as a married or unmarried individual). If the Secretary of the Treasury finds that any such amount is payable, he shall withhold from such funds an amount equal to the past-due support, and pay such amount to the State agency (together with notice of the individual's home address) for distribution in accordance with section 457(b)(3). (Emphasis added.)

As pointed out by the Court of Appeals in *Sorenson v. Secretary of the Treasury, supra* at 1443, Congress, in amending the Social Security Act, did not provide any exclusionary language for the earned income credit; instead, Congress stated that the interception applied to *any amounts* payable as tax refunds. Since "any amounts payable, as refunds of Federal taxes paid" are subject to interception under § 464(a), it must be determined what amounts are payable as refunds of federal taxes paid. Section 2331(c) of OBRA amended the Internal Revenue Code by amending 26 USC § 6402 and adding 26 USC § 6402(c). As previously stated, 26 USC § 6402(c) provides for the offset of past-due support against "... any amount to be refunded to the person making the overpayment ..." and 26 USC § 6401(b) provides that earned income credits shall be refunded as an overpayment. If Congress intended that only refunds of actual taxes paid would be intercepted, § 464(a) of the Social Security Act would not have provided that any amounts *payable* as tax refunds could be intercepted.

Moreover, if there is doubt concerning what is meant when § 464(a) requires the interception of *any amounts* payable as refunds of federal taxes, this doubt should be resolved by the application of the maxim of noscitur a sociis, which holds that words employed in a statute are

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[3] *Algoma Plywood & Veneer Co. v. Wisconsin Employment Relations Board*, 336 U.S. 301, 306 (1948).

construed and their meaning ascertained, by reference to words or phrases with which they are associated.[4]

The Court of Appeals for the Ninth Circuit in *Sorenson* correctly concluded that § 2331(a) of the OBRA, which added a new section to the Social Security Act, § 464(a) (42 USC § 664), authorizes the interception of earned income credits for past-due support, as it is apparent that authorizing offset for "any amounts" payable as refunds of federal taxes paid includes earned income credits because of the provisions for payment of earned income credits set forth in the Internal Revenue Code, 26 USC § 6401. The same conclusion was reached by the Court in *Coughlin v. Regan*, 584 F.Supp. 697 (D. Maine 1984).

B. Congress did not intend to exclude earned income credits from interception for past-due child support

1. Congressional intent as to earned income credits.

Although Congress in adopting the earned income credit benefit program, which originated in the Tax Reduction Act of 1975, P. L. 94-12, may have sought to provide an incentive for low-income people to work, as maintained by the petitioner, Congress specifically provided in 26 USC § 6401 that earned income credits would be refunded as an overpayment of taxes. The fact that there may be no actual tax liability does not present an earned income credit from constituting an overpayment under 26 USC § 6401(c). As pointed out by the Court in *Sorenson*, 752 F.2d at 1443 in footnote 1, it appears from legislative history that earned income credits were not designed as a welfare program, but as a method to negate the disincentive of Social Security taxes, citing S. Rep. No. 36, 94th Cong. 1st Sess. 12, reprinted in 1975 U.S. Code Cong. Ad. News 54, 63-64,

[4] *International Rice Milling Co. v. N.L.R.B.*, 183 F.2d 21, 25 (1950 CA 5), reversed on other grounds 341 U.S. 665, rehearing denied 342 U.S. 843.

83-84. When earned income credits are considered as an offset against Social Security taxes, which appeared to be the congressional intent, the fact that earned income credits are treated as a refund of federal taxes paid under § 26 USC § 6401 is more readily understood, and supports the contention of the Ninth Circuit Court of Appeals that amounts refunded as earned income credits are to be considered the same as any other tax refund.[5]

2. Congressional interest as to the tax intercept program.

The petitioner observes that no party to this litigation and no court that has written on the subject has been able to cite any mention of the earned income credit in connection with the provisions of OBRA implementing the child-support intercept program. An exhaustive search of the appropriate committee meetings and decisions concerning the adoption of OBRA on the floor of the House and Senate fail to reveal any mention of earned income credits in connection with the intercept program.

In the absence of any expression of legislative intent, other means to determine legislative intent must be utilized. One such rule is the "pari materia" rule of construction which holds that all statutes having the same general purpose should be construed together as one law[6] or one

[5] It is noted that the petitioner cites *In Re Searles*, 445 F.Supp. 749, 755 (D. Conn. 1978) for the proposition that earned income credits are not a refund of federal taxes paid. *In Re Searles* was an appeal from a bankruptcy judge. It was held in *Searles* that an earned income credit did not constitute property to be considered an asset of the bankrupt. The District Court, Blumenfeld, J., recognized that earned income credits were intended to compensate low-income earners for social security taxes, *Id.* at 754.

[6] *Rosenberg v. U.S.*, 346 U.S. 275, 294 (1953) rehearing denied 346 U.S. 324.

system governed by a generally conceived policy. The congressional policy in regard to enforcement of child support is expressed by repeated congressional concerns. A congressional study issued in 1974 concluded that over twelve million children in the country, almost one out of every five, do not live with both parents. Most of these children live with their mothers and over half live below the poverty line. A sample of absent parents under support orders showed that only a quarter were paying 90 percent or more of the order or agreement, although presumably these orders or agreements are based upon a finding of ability to pay.[7] The petitioner attempts to interpret the intent of Congress claiming it was intended by Congress that earned income credits be excluded from the intercept program because of alleged hardship that the program would inflict on low-income persons. Congress did not intend that low-income persons be exempt from the tax intercept program. Congress may very well have intended that persons who were not paying court orders for the support of a first family were not necessarily entitled to an earned income credit, as one of the conditions for qualifying for an earned income credit under § 43(a) of the Internal Revenue Code is that the person claiming such a credit is supporting a dependent.

[7] 120 Cong. Rec. Vol. 120, Part 28, 38196-98 (12-4-74)

CONCLUSION

For the foregoing reasons, the judgment below should be affirmed.

RESPECTFULLY SUBMITTED,

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